88-1052

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNS-MANVILLE CORPORATION AND
JOHNS-MANVILLE SALES CORPORATION,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

28 U.S.C. § 1500 deprives the United States Claims Court of jurisdiction of a claim if the Claims Court plaintiff also has a suit pending in any other court "for or in respect to" the same claim. The question presented is:

Whether for purposes of Section 1500, a district court action that seeks to recover damages for a different injury, premised on a different legal theory, alleging a different cause of action (over which the district court has exclusive jurisdiction), and which has been judicially stayed, constitutes a pending claim "for or in respect to" which a party seeks relief in the Claims Court, thereby depriving the Claims Court of jurisdiction.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

STATEMENT PURSUANT TO RULE 28.1

Each petitioner is a wholly-owned subsidiary of Manville Corporation. Neither petitioner has any subsidiaries other than wholly-owned subsidiaries.

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Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Johns-Manville Corporation and Johns-Manville Sales Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 855 F.2d 1556. The opinion of the United States Claims Court on the issue of jurisdiction (App., *infra*, 33a-74a) is reported at 12 Cl. Ct. 197 (1987).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1988 (App., *infra*, 81a). On November 12, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1500 provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

This case arises from the decision of a divided panel of the Federal Circuit in which the majority broadly interpreted the statutory term "claim" in Section 1500 to bar jurisdiction in the Claims Court of actions filed by petitioners under the Tucker Act, 28 U.S.C. § 1491, and thus arising within the *exclusive* jurisdiction of the Claims Court. The panel majority so held even though petitioners did not have "pending" in any other court "any suit or process for or in respect to" the same legal wrong or measure of damages sought in the Claims Court.

A brief procedural history will set the legal issues in context.

1. Petitioners are government contractors who, over a period of more than forty years, supplied to the government asbestos-containing products manufactured strictly according to government specifications. Petitioners subsequently paid, in judgments and settlements, substantial amounts to particular shipyard workers who were exposed to asbestos during their employment at government installations. Petitioners then sought reimbursement from the government for the payments they had made to each individual claimant.

On July 19, 1983, petitioners filed the first of three complaints (No. 465-83C) in the United States Claims Court. That complaint stated ten claims under the Tucker Act seeking $768,361.09 for reimbursement of certain settlements and judgments that petitioners had paid to 56 individuals (each specifically identified in the pleadings) who had alleged exposure to asbestos-containing products during their employment in government shipyards during World War II (the "*WW II* case").[1]

On the government's motion, the Claims Court granted partial dismissal, but left undisturbed petitioners' claims that (1) the government had breached an implied warrantly that asbestos-containing products manufactured in strict accordance with government specifications would be free from defects so long as petitioners strictly complied with those specifications; (2) the government had breached its duty to disclose its superior knowledge regarding the exposure of government shipyard workers to excessive concentrations of asbestos and (3) mutual mistakes by petitioners *and* the government regarding shipyard worker injury from exposure to government-specified asbestos-containing products justified reformation of the government contracts. *See Johns-Manville Corp. et al. v. The United States*, 12 Cl. Ct. 1, 33, 36 (1987) (Order).[2]

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[1] The complaint in the *WW II* case also sought $185,741.55 in attorney's fees, costs and expenses which petitioners incurred in defending lawsuits filed by these 56 claimants and by 398 other named World War II claimants (also specifically identified in the pleadings), plus additional damages for increased insurance and business costs.

[2] Petitioners subsequently filed two other complaints in the Claims Court asserting essentially identical Tucker Act claims as in the *WW II* case, but relating to injuries that occurred during different time periods. Because both the Federal Circuit and the Claims Court framed and discussed the Section 1500 jurisdictional

2. Shortly before the trial date in the *WW II* case—then scheduled for May 1987—the Claims Court *sua sponte* directed the government to state its position on whether 28 U.S.C. § 1500 barred jurisdiction in the Claims Court over petitioners' Tucker Act claims in light of certain suits stating claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, that petitioner had filed in the district courts. App., *infra*, 36a.[3] The government responded by moving to dismiss each of petitioners' three Tucker Act suits.

In granting the government's motion to dismiss, the Claims Court held (App., *infra*, 57a-58a) that Section 1500 deprived it of jurisdiction principally in view of a single lawsuit filed by petitioners in 1981 in the Northern District of California, *Johns-Manville Sales Corp. v. United States*, No. C-81-4561-RFP (the "*Robinson* case"). As the district court in the *Robinson* case observed, petitioners sought to recover $45,500 (plus expenses) under

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issue in terms of the *WW II* case, we mention the other Claims Court cases only in passing.

On November 16, 1983, petitioners filed their second complaint in the Claims Court (No. 688-83C) seeking $2,003,700 (plus expenses) in reimbursement for settlements and judgments paid to 142 named claimants (identified in the pleadings) who had alleged exposure to asbestos-containing products during their employment in government shipyards in 1964 and years following (the "*Post-1963*" case).

On January 3, 1984, petitioners filed a third complaint in the Claims Court (No. 1-84C), seeking $32,339,252 (plus expenses) in reimbursement for settlements and judgments paid to claimants whose alleged exposure to asbestos while employed in government shipyards did not fall exclusively within the time period of either the *WW II* case or the *Post-1963* case (the "*Mixed Exposures*" case).

[3] Although the government had previously raised—and then withdrawn—the contention that Section 1500 was a jurisdictional bar against asbestos-related claims by *other* plaintiffs, the government had never interposed a jurisdictional objection to petitioners' Claims Court actions. App., *infra*, 36a.

the Federal Tort Claims Act for settlement payments to John C. Robinson, a shipyard worker who had been employed in the "rip-out" and disposal of asbestos-containing products at a government facility in the 1960s. App., *infra*, 84a-85a (reported at 622 F. Supp. 443 (N.D. Cal. 1985)).[4] Thus, in *Robinson*, petitioners were "complaining . . . about the alleged actions occurring at two naval bases in California where the government's alleged failure to warn and supervise John Robinson was the proximate cause of the harm [petitioners] ha[ve] suffered." *Id.* at 86a n.5. The *Robinson* case was wholly inactive at the time of the Claims Court's Section 1500 Order, the district court having judicially stayed all proceedings in that case.

In ruling on the Section 1500 issue, the Claims Court recognized that petitioners' contention "technically is correct" that the Robinson claim was not included in any action filed in the Claims Court. App., *infra*, 53a-54a, 60a n.6. In fact, it is undisputed that petitioners made no claim whatsoever in the Claims Court for the payments made to Mr. Robinson. The Claims Court also acknowledged that the "theories of relief differ" between the *Robinson* tort case and the *WW II* Tucker Act/contract case. *Id.* at 58a. Moreover, it is also undisputed that petitioners could not have brought an action under the Federal Tort Claims Act (*viz.*, the *Robinson* case) in the Claims Court, and that petitioners could not have brought a Tucker Act/contract claim in excess of $10,000 (*viz.*, the *WW II* case) in the district court.

Despite those plain and significant differences, the Claims Court nevertheless concluded that a "homoge-

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[4] Although petitioners filed other district court complaints stating claims under the Federal Tort Claims Act, both the Federal Circuit (App., *infra*, 23a n.16) and the Claims Court (App., *infra*, 63a n.8) limited their Section 1500 analysis to the effect of the *Robinson* case on Claims Court jurisdiction.

neity of operative facts renders [the] claims the same for purposes of Section 1500." App., *infra*, 57a.[5]

3. A divided panel of the Federal Circuit affirmed the Claims Court's holding that Section 1500 barred jurisdiction of petitioners' Tucker Act claims in the *WW II* and other Claims Court cases. The majority initially observed that Section 1500 is designed "to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." App., *infra*, 12a. This case, therefore, implicates the doctrines of claim preclusion and issue preclusion which this Court has frequently considered in similar situations where it was necessary to define the term "claim."[6] However, the court below did not discuss any of this Court's recent pronouncements. Rather, and in contrast to this Court's

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[5] The Claims Court announced that petitioners would have 60 days to decide whether to pursue the *Robinson* case or the *WW II* case. App., *infra*, 63a-64a. It therefore did not immediately dismiss the *WW II* case. Instead, the court certified its decision on jurisdiction for an interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(2). *Id.* at 73a. The Federal Circuit promptly granted leave for an interlocutory appeal and directed the Claims Court not to dismiss petitioners' actions "pending resolution of the instant appeal." *Id.* at 78a. While the interlocutory appeal on jurisdiction was pending in the Federal Circuit, the Claims Court proceeded with the trial of petitioners' *WW II* case, which turned out to be one of the lengthiest trials in the history of the Claims Court.

On August 6, 1987, the Claims Court disposed of the case on the merits adversely to petitioners. 13 Cl. Ct. 72 (1987). The Federal Circuit vacated the Claims Court's decision on the merits following the disposition of the interlocutory jurisdictional appeal. 855 F.2d 1571 (1988).

[6] *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386-87 (1985) (Illinois preclusion law); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 77 n.1, 85-87 (1984) (Ohio preclusion law); *Nevada v. United States*, 463 U.S. 110, 130 & n.12 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-81 & n.22 (1982) (New York preclusion law); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1982); *Montana v. United States*, 440 U.S. 147, 156 (1979).

opinions, the majority held, for purposes of Section 1500, that the term "claim" had no plain meaning (App., *infra*, 8a), and could not be defined with reference to the legal theories relied on by plaintiff (*id.* at 12a). Rather, on the premise that "facts" trumped legal theories, the majority disregarded the plain differences between the claims and focused instead on eight allegations it deemed common to the *WW II* and *Robinson* actions. *Id.* at 15a. These allegations it characterized as "operative facts" sufficient to defeat Claims Court jurisdiction under Section 1500. *Id.* at 14a, 15a-16a.

It was thus irrelevant to the majority's analysis that the claims asserted in the *WW II* case sounded in contract while the claims asserted in *Robinson* sounded in tort. App., *infra*, 15a). Likewise, under an "operative facts" analysis it was also irrelevant to the court of appeals that the *WW II* case involved specific duties and events arising in the 1940s, while the *Robinson* case involved other duties and events arising in the 1960s. *Ibid.* Those distinctions were not deemed "operative" facts. It was also irrelevant to the court that there was *no claim* in the Claims Court relating in any way to the amount paid by petitioners to Mr. Robinson. *Id.* at 16a.

The Federal Circuit majority expressly rejected petitioners' contention that the *WW II* claims were not "for or in respect to" the recovery sought in the *Robinson* suit because the claims stated in each respective action required elements of proof that were not at issue in the other. App., *infra*, 16a. The majority expressly held that "[s]ince the legal theory is not relevant, neither are the elements of proof necessary to present a prima facie case under that theory." *Id.* at 17a.

The majority also expressly rejected petitioners' contention that since Section 1500 was designed to prevent duplicative litigation in the Claims Court (*i.e.*, by requiring a plaintiff to elect between several forums in

which jurisdiction of its claim could lie), it had no application where, as here, petitioner could not have brought both its Tucker Act and its Federal Tort Claims Act claims in a single forum. App., *infra*, 18a. The majority stated that Section 1500 was enacted for the benefit of the government and was "intended to force an election [*i.e.*, between tort claims and Tucker Act claims] where both forums could grant the same relief [*i.e.*, money], arising from the same operative facts." *Ibid.*

Finally, the majority regarded as irrelevant the fact that the *Robinson* case had been judicially stayed and the government was not therefore being forced to litigate "in two courts at the same time." *See* App., *infra*, 12a. The court of appeals held that even a long-inactive and judicially stayed case was "pending" for purposes of the jurisdictional bar of Section 1500. *Id.* at 23a-24a.

4. Judge Nichols dissented. App., *infra*, 26a-31a. He disagreed with each step in the majority's analysis, which he characterized as "a departure from precedent" and an "unseemly" judicial creation of jurisdictional roadblocks. *Id.* at 31a. As a threshold matter, he rejected the majority's exclusive focus on so-called "operative facts" (*id.* at 29a):

> The court insists on repeating that the tort and contract claims of Johns-Manville against the government are "based on the same operative facts". If the "operative facts" in this situation are the facts the claimant must prove to establish the claims, obviously they are not the same. For a contract claim the "operative facts" must include a showing that a contract was made, express or implied-in-fact. No such requirement exists in a tort case, but in the normal situation, which this is, the action proceeds on a negligence theory and the "operative facts" will include a showing that a duty of care arose, not from contract, but from circumstances where injury to others was foreseeable.

Second, Judge Nichols pointed out (App., *infra*, 28a) that in *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-356 (1932), this Court stated that Section 1500 required an election of forum only "when parties have an election" to combine all of their claims in a single action. Section 1500, in his view, had no application where, as here, petitioners could not sue the United States on tort claims in the Claims Court and could not sue the United States on contract claims exceeding $10,000 in the district court. App., *infra*, 28a.

Third, the dissent pointed out that the *Robinson* case did not state a claim "for or in respect to" any claim in the *WW II* case, and therefore could not constitute the "same claim," because there was no overlap whatsoever in the injuries that formed the basis for the requested relief (*i.e.*, the underlying settlements or judgments for which petitioners were seeking to recover from the government). Judge Nichols put it this way (App., *infra*, 31a):

> The court is also unacceptably hostile to jurisdiction in that it disregards this question: suppose [petitioners have] incurred expense and pursue[] indemnification for settling with asbestosis sufferers A, B, and C. Is this one claim or three? Add a further complication: suppose the payments to A, B, and C are sued for in the district court, but left out of the Claims Court suit and instead [petitioners pursue] indemnification in the Claims Court for settling with D and E. I am inclined to think this court would say it is all one claim under this hypothetical, because it would say the "operative facts" were the same. To this I emphatically disagree. I think the asserted right to indemnification is a separate claim for each person settled with.

REASONS FOR GRANTING THE PETITION

This case presents an important and frequently recurring question on the proper scope of Claims Court jurisdiction. The decision below incorrectly limits that jurisdiction in a manner never intended by Congress in enacting Section 1500 and its predecessor statutes. Unless reversed by this Court, that decision, as a practical matter, will circumscribe the right of future claimants to seek judicial review in the Claims Court of otherwise justiciable Tucker Act claims against the United States.

A brief sampling of recent Claims Court Section 1500 decisions reflects the broad spectrum of claimants who, because they have other suits pending in the exclusive jurisdiction of the district courts, must run the arbitrary and unpredictable gauntlet of the statute. *See, e.g., Hill v. United States*, 8 Cl. Ct. 382, 384 (1985) (claims against federal officials alleging violations of Title VII and sex discrimination); *Dwyer v. United States*, 7 Cl. Ct. 565 (1985) (claims for negligence arising from Farmers Home Administration foreclosures on ranch); *Chavez v. United States*, 14 Cl. Ct. 212 (1988) (claims for negligence against Secretary of Agriculture arising from defective design and installation of underground water pipeline); *Benally v. United States*, 14 Cl. Ct. 8 (1987) (claim for negligence against Bureau of Indian Affairs arising from child abuse at Navajo school); *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386 (1984) (pre-award challenge to determination by Small Business Administration that plaintiff was not a "small business"); *Boston Five Cents Savings Bank FSB v. United States*, 14 Cl. Ct. 217 (1988) (claim against Department of Housing and Urban Development arising from conversion of cooperative apartment building).

The decision below unhinges Section 1500 from its established statutory and judicial moorings. Unless the

decision is reversed, potential claimants against the government—for whom Congress intended to provide a harbor in the Claims Court—will lack guidance in navigating around the shifting shoals of Section 1500.

1. It is common ground in this case that petitioners seek no relief in the Claims Court "for or in respect to" any payment made by petitioners to Mr. Robinson. As a result, Section 1500 should be wholly inapplicable. As this Court stated unanimously in *Matson Navigation Co. v. United States*, 284 U.S. at 355-56, the predecessor statute to Section 1500 was enacted "only to require an election between a suit in the Court of Claims and one brought in another court in which the judgment would not be res adjudicata."[7] The original intent of the statute as explained in *Matson Navigation* remains operative today[8]—to preclude relitigation of the same claim at

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[7] Under the statutory scheme in place when the first version of Section 1500 was enacted in 1868, suits against the United States could be brought only in the Court of Claims while the district courts had exclusive jurisdiction over similar claims against a government officer. *See* Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 576-80 (1967). Accordingly, it was possible for a claimant to sue a government officer in district court and, if dissatisfied with the proceedings, to sue the United States on the same claim in the Court of Claims. Res judicata posed no bar to the latter suit because the government was not a party to the earlier suit. The precursor of Section 1500 was, therefore, designed to require a plaintiff to choose one forum for his single claim and to interpose the same bar that res judicata would have posed to duplicative litigation had the government been defendant in both the earlier and latter law suits. As observed in Schwartz, *supra*, "Section 1500 did not set out to forbid two suits but rather to provide for the principle of res judicata, believed to be absent in successive suits against a government officer and the government." 55 Geo. L.J. at 599.

[8] The Revisor's Note to the 1948 Judicial Code indicates that revisions to the language of the predecessor statute (Section 154 of the Judicial Code of 1911), were changes "in phraseology" and were not intended to have substantive effect. 28 U.S.C. § 1500 note.

the same time in the Claims Court and another court. That is not the present situation.

The majority opinion in this case cannot be reconciled with the statement of Congressional intent in *Matson Navigation*.[9] The majority invoked Section 1500 even though petitioners had no possible election of forum. The *WW II* Tucker Act/contract case, seeking recovery for amounts paid to 56 persons allegedly injured in the 1940s, could only have been brought in the Claims Court—the exclusive jurisdiction for contract claims seeking damages in excess of $10,000. Likewise, the *Robinson* tort case, seeking recovery for amounts paid to one named individual allegedly injured in the 1960s, could only have been brought in a district court—the exclusive jurisdiction for tort actions against the United States. To bar jurisdiction in the Claims Court is not "to require an election"—as Congress intended—but rather to deprive a claimant of precisely the exclusive forum Congress created for the vindication of its Tucker Act rights.

In direct contrast to the decision below, this Court has permitted the maintenance of simultaneously pending claims for money damages in the Court of Claims and the district courts based on the same "operative facts". *See, e.g., Pennsylvania R. Co. v. United States*, 363 U.S. 202 (1960). In that case, this Court recognized the jurisdictional conundrum created by the lack of statutory jurisdiction in the Court of Claims to review an order by the Interstate Commerce Commission (a matter going directly to the question of damages), which jurisdiction had been "vested exclusively in the District Courts." *Id.* at 205. Thus, even though the government had moved to dismiss the Court of Claims litigation under

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[9] The comments of Senator Edmunds, the author of the original bill (81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868)), are reprinted in the text of the decision below at App., *infra*, 9a.

Section 1500, *id.* at 204, and the order reviewed by the district court was "essentially one 'for the payment of money'," *id.* at 205, this Court concluded that the Court of Claims was not deprived of jurisdiction. Rather, the Court of Claims "was under a duty to stay its preceedings pending [the district court's] review." *Id.* at 206.

2. The decision below incorrectly interposes Section 1500 as a jurisdictional bar even though petitioners do not seek in the Claims Court a second chance to litigate the "same claim" asserted against the government in the *Robinson* case. It is undisputed that petitioners seek no recovery in the Claims Court in respect of payments made to Mr. Robinson (the sole claim in the *Robinson* case). Thus, res judicata precepts—and, hence, Section 1500—are not implicated by the contemporaneous filing of petitioners' tort and contract claims.[10] As the government conceded in its brief to the court of appeals (Gov't C.A. Br. 27): "obviously, a final judgment in a tort case will not have res judicata effect in a later-decided contract case." Section 1500 does not apply in these circumstances because the statute was not designed to be more expansively preclusive than the doctrine of res judicata itself.

3. The majority's "operative facts" analysis of the term "claim" cannot be reconciled with this Court's pronouncements on the definition of "claim" for purposes of res judicata/claim preclusion. As noted in *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983), quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927) (emphasis in original):

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[10] To the extent, of course, that a common issue of fact may be litigated and decided in one case, well-settled rules of issue preclusion and collateral estoppel would operate as between the parties in any subsequent proceedings where the applicable standards for invoking those doctrines have been satisfied. *See, e.g., Nevada v. United States*, 463 U.S. 110, 130 (1983); *Montana v. United States*, 440 U.S. 147, 153 (1979).

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. . . . The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing*, therefore, which in contemplation of the law as its cause, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*"

The Federal Circuit flatly contradicted this Court's settled analysis when it concluded that "[c]laims are the same where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court." App., *infra*, 24a.

In contrast to the broad and novel reading the decision below gives to the term "claim," the respective claims in the *WW II* and *Robinson* cases cannot be considered the "same claim" under any accepted, traditional, or even comprehensible understanding of that term. *See Montana v. United States*, 440 U.S. at 156; *United States v. Moser*, 266 U.S. 236, 242 (1924). As stated by Judge Nichols in his dissent (App., *infra*, 31a), it is well-settled that petitioners' asserted right to indemnification states a separate claim for each person to whom a payment was made by way of judgment or settlement. *See Greyhound Lines, Inc. v. Cobb County*, 681 F.2d 1327, 1332 (11th Cir. 1982); *Garza v. Arizona Refining Co.*, 634 F. Supp. 959, 962 (S.D. Tex. 1986); *s.a.r.l. Orliac v. Winebow, Inc.*, 595 F. Supp. 470, 473 (S.D.N.Y. 1984); *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1437 (S.D.N.Y. 1983); *Ohio Casualty Insurance Co. v. Ford Motor Co.*, 443 F. Supp. 80, 82 (S.D. Ohio 1977).

A further indication that the Tucker Act claims in the *WW II* case are not the "same claim" as petitioners asserted in the *Robinson* case is that the courts below did

not have the ordinarily available option of transferring the claims in the *WW II* case under 28 U.S.C. § 1631 to a court in which that action "could have been brought." The *WW II* claims could not have been brought in "any other court" because the Claims Court has *exclusive* jurisdiction of contract claims seeking damages in excess of $10,000.

4. The addition of the decision below to the Court of Claims' Section 1500 jurisprudence creates a crazy-quilt approach to Section 1500 in which the statutory language is read sometimes narrowly, sometimes broadly, but without consistency or coherence. As a result, potential Claims Court plaintiffs lack clear and predictable guidance for filing claims against the United States under the system of concurrent and parallel rights created by Congress under the Tucker Act and the Federal Tort Claims Act (as well as other statutes giving rise to causes of action in the exclusive jurisdiction of the district courts). The decision below creates "serious . . . jurisdictional uncertainties" similar to those addressed by this Court in *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 173-74 (1976) (resolving dilemma posed by jurisdictional uncertainties in overlap between claims under the Suits in Admiralty Act and the Tucker Act).

Earlier Court of Claims' decisions have applied Section 1500 to permit claimants to file and simultaneously maintain different claims against the government in two courts, even where both claims flowed from the *same* "operative facts." In *Casman v. United States*, 135 Ct. Cl. 647 (1956), for example, a discharged employee was permitted to sue for back pay in the Court of Claims under the Tucker Act (the exclusive jurisdiction for that cause of action) at the same time that he was suing the government for reinstatement in the district court (the exclusive jurisdiction for that cause of action). The Court of Claims cited this Court's decision in *Matson Navigation, supra*, as authority for its deci-

sion. *See* 135 Ct. Cl. at 649-50; *see also* App., *infra*, 28a (Nichols, *J.* dissenting). *Accord*, *Prillman v. United States*, 220 Ct. Cl. 677 (1979) (Tucker Act claim for back pay in excess of $10,000 not barred by co-pending district court action for reinstatement and back pay less than $10,000 under Title VII); *Allied Materials v. United States*, 210 Ct. Cl. 714 (1976) (Tucker Act claim in Court of Claims not barred by co-pending suit in district court seeking damages for tortious interference with contract and violations of the antitrust laws and the Federal Property and Administrative Services Act, 40 U.S.C. §§ 488 *et seq.*).

In each of the foregoing decisions, the complaints filed in the Court of Claims and in the district court clearly were based on the same "operative facts." Section 1500 was not read to bar jurisdiction in the Court of Claims because, as the court explained in *Allied Materials*, plaintiffs could not combine all their claims in one court and therefore had no available election between jurisdictions. *See* 210 Ct. Cl. at 715-16. That is precisely the present situation.

The only explanation offered by the Federal Circuit for barring petitioners' suits, but not those of plaintiffs in *Casman*, *Prillman* and *Allied Materials*, is that the latter plaintiffs sought equitable relief in the district courts. App., *infra*, 22a. But the language of Section 1500 draws no distinction between equitable relief and money damages, nor is that the basis upon which *Casman*, *Prillman* and *Allied Materials* were decided. Nor is the Federal Circuit's distinction reconcilable with this Court's disposition in *Pennsylvania R. Co.*, *supra*. Rather, Section 1500 refers solely to claims "for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States. . . ." The jurisdictional issue is whether the claims are the "same."

Indeed, the respective Court of Claims and district court claims in *Casman*, *Prillman* and *Allied Materials* are more nearly the "same" than were petitioners' respective claims. Those earlier cases were based—in the jargon of the decision below—on precisely the same "operative facts." To the contrary, however, the *Robinson* and *WW II* cases allege entirely different legal rights, duties, and injuries. If petitioners are barred from the Claims Court in these circumstances, then countless other claimants—discharged federal employees, armed services personnel, Indians, government contractors, taxpayers—similarly may be deprived of their rights under the Tucker Act.

5. The dilemma for potential Claims Court plaintiffs is further aggravated by another distinction that has been judicially engrafted onto Section 1500 and applied in this case. In *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 946 (1965), *cert. denied*, 382 U.S. 976 (1966), the Court of Claims held that the jurisdictional bar of Section 1500 applied only when plaintiff's district court suit was filed before its action in the Court of Claims.[11] Thus, if petitioners had filed suit first in the Claims Court and only thereafter filed the *Robinson* case in the district court, under Claims Court and Federal Circuit precedent, Section 1500 would not have applied. *But see Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86, 95

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[11] Petitioners argued below that although an initial complaint was filed in *Robinson* before the Claims Court litigation began, the *Robinson* tort claims—which were deemed "the same" as petitioners' Tucker Act claims—were not filed until the district court permitted an amended complaint to be filed. As the amended complaint in *Robinson* was filed *after* the last of the Claims Court suits, and because the newly-added tort claims would not relate back to the date of filing of the *Robinson* complaint under Ninth Circuit precedent (the judicial circuit in which the case was filed), petitioners argued that they fell under the *Tecon Engineers* exception to Section 1500. The Federal Circuit rejected petitioners' contention without citation to case law or other explanation. App., *infra*, 4a-5a n.3.

(1924) (later-filed actions held to divest Court of Claims of jurisdiction under predecessor statute to Section 1500).

There is no warrant in the language or purpose of Section 1500 to bar petitioners' Tucker Act claims in the Claims Court merely because these claims were filed after the *Robinson* case commenced. The inevitable result of the decision below is to encourage and to institutionalize jurisdictional gamesmanship. Meritorious claims may be forfeited when plaintiffs, who filed suit first in a district court (*e.g.*, to protect certain tort claims against the operation of the statute of limitations, 28 U.S.C. § 2401), subsequently learn that a bizarre after-the-fact reading of the term "claim" in Section 1500 precludes the filing of any contract-based claim in excess of $10,000 in the Claims Court. This is a very real concern because, as this Court has noted in a similar context, the statute of limitations for many causes of action (such as claims under the Federal Tort Claims Act) is shorter than the six-year statute of limitations for Tucker Act claims in the Claims Court (28 U.S.C. § 2501). *See United States v. United Continental Tuna Corp.*, 425 U.S. at 173 n.7.

The impact of the decision below has already begun to be felt. On November 15, 1988, the government, relying on the decision below, moved under Section 1500 to dismiss nine suits filed by asbestos manufacturers in the Claims Court, involving hundreds of underlying claims. This Court should step in now to undo the dislocation between the decision below and settled precedent interpreting Section 1500 and res judicata principles, and thereby to restore Section 1500 to its proper role.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 22, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1332

JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Harvey G. Sherzer, Howrey & Simon, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Robert M. Bruskin*, *Barbara A. Duncombe* and *John R. Alison*. Also on the brief were *Robert D. Batson* and *Nancy E. Stead*, Manville Corporation, Littleton, Colorado, of counsel.

Harold J. Engel, Deputy Director, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *John R. Bolton*, Assistant Attorney General, *J. Patrick Glynn*, Director and *David S. Fishback*, Senior Trial Counsel.

Robert M. Chilvers, Brobeck, Phleger & Harrison, of San Francisco, California, represented the Amicus Curiae, Fibreboard Corporation. Also on the brief was *Ann T. Olson*, Brobeck, Phleger & Harrison, of San Francisco, California, of counsel. *Paul E. Zevnik*, Kaye, Scholer, Fierman, Hays & Handler, of Washington, D.C., represented the Amicus Curiae GAF Corporation. With him on the brief were *David O. Bickart* and *Molly D. Current*. Also on the brief were *Max Gitter* and *Stuart*

M. Cobert, Paul, Weiss, Rifkind, Wharton & Garrison, of New York, New York and *John P. Carey*, Paul, Hastings, Janofsky & Walker, of Washington, D.C., of counsel.

Appealed from: U.S. Claims Court

Judge Nettesheim

DECIDED: August 25, 1988

Before MARKEY, *Chief Judge*, RICH, *Circuit Judge*, NICHOLS and BENNETT, *Senior Circuit Judges*, and ARCHER, *Circuit Judge*.

PER CURIAM.

This is an appeal from an interlocutory order of the United States Claims Court (Nettesheim, J.), entered April 6, 1987, and reported as *Keene v. United States*, 12 Cl. Ct. 197 (1987). The Claims Court granted a motion to dismiss three suits, Nos. 465-83C, 688-83C, and 1-84C, brought by Johns-Manville Corporation and Johns-Manville Sales Corporation (Johns-Manville).[1] The Claims Court certified the order for immediate appeal pursuant to 28 U.S.C. § 1292(d)(2) (1982). Johns-Manville's petition for review was granted on May 6, 1987. We affirm.

BACKGROUND

The motion to dismiss was made in response to a *sua sponte* order, entered January 20, 1987. The order required the United States to state its position on the ap-

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[1] The government's motion to dismiss included the cases filed by several other asbestos manufacturers. An order entered February 13, 1987, limited the initial ruling on defendant's motion to the three Johns-Manville cases since case No. 465-83C was scheduled to begin trial. *See Keene*, 12 Cl. Ct. at 198-99 n.1.

plicability of 28 U.S.C. § 1500 (1982). In its present form section 1500 states:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

I. *Cases Filed and Theories of Relief*

The three cases dismissed by the order on appeal were filed in the Claims Court as test cases which were representative of thousands of separate claims. *See Keene*, 12 Cl. Ct. at 201. In each of the three cases Johns-Manville seeks indemnification from the United States for Johns-Manville's liabilities to shipyard workers who were exposed to asbestos manufactured by Johns-Manville and sold to the United States. Each case covered a different time period. In *Johns-Manville Corp. v. United States*, No. 465-83C (Cl. Ct. filed July 19, 1983), Johns-Manville seeks indemnification for its actual or potential liabilities for injuries to shipyard workers exposed to asbestos during World War II (WWII). The theories of relief are (1) breach of an implied warranty of specifications, (2) breach of a duty to reveal superior knowledge, (3) reformation of the contract due to mutual mistake of material facts, and (4) equitable adjustment.[2]

The second suit, *Johns-Manville Corp. v. United States*, No. 688-83C (Cl. Ct. filed Nov. 16, 1983), demands indemnification for actual or potential liabilities to work-

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[2] Johns-Manville's original complaint had 10 legal theories, but one was dropped and all but four of the remaining theories were dismissed upon the government's motion. *Keene*, 12 Cl. Ct. at 203.

ers injured by exposure to asbestos after 1963. Johns-Manville raises the same theories of relief raised in No. 465-83C and additionally raises (1) breach of warranty to use products safely arising from control by the United States of the specifications and conditions of use, (2) rights as an intended and third-party beneficiary of the supply contracts, and (3) breach of an additional implied-in-fact contract to indemnify, arising out of the government's requirement of contract compliance and its control of the asbestos products. The third complaint, *Johns-Manville Corp. v. United States*, No. 1-84C (Cl. Ct. filed Jan. 3, 1984), seeks indemnification for Johns-Manville's liabilities to workers injured by exposure to asbestos during unrestricted or overlapping time periods. The complaint repeats the theories raised in No. 465-83C and, additionally, alleges the implied contract to indemnify applies to later "rip-out" operations under the exclusive control of the United States.

Prior to filing in the Claims Court, Johns-Manville filed indemnification claims in district courts. *Johns-Manville Sales Corp. v. United States*, No. C81 4561 RFP (N.D. Cal. filed Dec. 7, 1981) (the Robinson case), seeks indemnification for amounts paid for defense and settlement of an action brought by John C. Robinson for injuries allegedly due to exposure to asbestos products sold to the United States by Johns-Manville.[3] The com-

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[3] Johns-Manville also filed indemnification actions in district courts after filing in the Claims Court. The Claims Court order in the instant appeal ruled on this issue and the United States petitioned to appeal that ruling. On June 11, 1987, we granted the government's motion to withdraw its petition for permission to appeal. Since the issue of after-filed claims is no longer contested and since it is not essential to the disposition of the rest of the appeal, we do not consider it nor do we consider the arguments relating to *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). Johns-Manville insists the Robinson case is an after-filed case because two of its original claims were dimissed and then the complaint was amended after

plaint pleads jurisdiction and rights of recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1976). The legal theories of relief raised are (1) negligence in discharge of the duties of the United States as a vessel owner in the use of asbestos products, (2) negligence in breach of implied warranties that Johns-Manville would not be liable for damages resulting from compliance with the specifications and that the products would be used in a safe manner, and (3) negligence in failing to reveal superior knowledge of the dangers of asbestos.

Prior to filing in the Claims Court, Johns-Manville also filed 59 third-party complaints in the Eastern District of Virginia.[4] In those actions Johns-Manville and other asbestos manufacturers seek indemnification from the United States if the manufacturers are found liable for asbestos exposure injuries to the plaintiffs. Johns-Manville pleads (1) breach of warranties of safe use, merchantability, and fitness for a particular purpose and (2) breach of duty to maintain a safe work place and to enforce health standards.

II. *Facts Pleaded*

In the Robinson case, Johns-Manville alleges as facts that the United States (1) compelled Johns-Manville to enter the supply contracts, (2) controlled the products by requiring compliance with the government's specifications, (3) controlled the conditions of use of the products,

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the Claims Court case was filed and, therefore, cannot be referenced in this appeal as triggering section 1500. We have considered its arguments and find them without merit. *See* Fed. R. Civ. P. 15(c).

[4] *E.g., Sacks v. Johns-Manville Corp.* No. 81-436-N (E.D. Va. filed May 15, 1981). On the same theories as in the Robinson case, Johns-Manville also filed an indemnification suit in the Western District of Washington, *Johns-Manville v. United States*, No. C83-798T (W.D. Wash. filed Oct. 15, 1982). It was dismissed for lack of prosecution on September 27, 1984.

(4) controlled access to the shipyards, (5) did not enforce its established safety standards, (6) knew of the health risks caused by lack of enforcement of the safety standards, (7) knew or should have known of the potential liability to Johns-Manville caused by the failure of the United States to enforce safety standards, and (8) Robinson was exposed to excessive concentrations of asbestos.

The factual allegations in the Claims Court cases overlap the factual allegations in the Robinson case and the third-party complaints. They all allege (1) the United States compelled compliance with supply contracts and with the Navy's specifications, (2) the United States had control of the shipyard working conditions, and (3) the United States established safety standards in the shipyards but did not follow them.

Issues on Appeal

Whether the trial court erred in holding:

1. a prior-filed district court suit presents the same "claim for or in respect to" an action filed in the Claims Court by the same plaintiff where each action is based on the same operative facts but different theories of relief.

2. a prior-filed, stayed suit is pending for purposes of barring jurisdiction in the Claims Court under 28 U.S.C. § 1500.

OPINION

This is a case of statutory construction. The disposition of the issue before this court requires determining the proper application of 28 U.S.C. § 1500, quoted above. Particularly in issue is the operation of the phrase "any claim for or in respect to which the plaintiff . . . has pending . . . ." We will first discuss the part of the

phrase reading "any claim for or in respect to" and then discuss the term "pending."

I. *Interpretation of "any claim for or in respect to"*

A. *Operative Facts versus Theories of Recovery*

1. *Legislative History*:

Statutory construction requires the application of recognized rules. *See generally Sutherland Statutory Construction* (4th ed.). First, "'"[t]he starting point in every case involving construction of a statute is the language itself."'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Second, where a statute states what a term "means" then all other meanings not stated are excluded. *Colautti v. Franklin*, 39 U.S. 379, 392 n.10 (1979). Third, clear evidence of legislative intent prevails over other principles of statutory consrtuction. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Fourth, absent a very clear legislative intent, the plain meaning will prevail. *Aaron v. SEC*, 446 U.S. 680, 697 (1980). Last, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *National Lead Co. v. United States*, 252 U.S. 140, 146-47 (1920); *Farrell Lines, Inc. v. United States*, 499 F.2d 587, 605 (Ct. Cl. 1974); *cf. Pierce v. Underwood*, 50 U.S.L.W. 4806 (U.S. June 27, 1988).

Not all of these rules of statutory construction are helpful in construing section 1500. Under the rule expressed in *Greyhound* we must first look to the language of the statute. To reiterate, in its present form this statute states:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other

> court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The rule expressed in *Colautti* and *Aaron* teach us what to look for in considering the language. First, we look for any express definitions within the statute. There are none. Second, we consider whether the language has a plain meaning. We are seeking to construe the phrase "any claim for or in respect to." The key word requiring interpretation is "claim." However, the word "claim" has no one meaning in the law. *See* Black's Law Dictionary 313 (4th ed. rev. 1968); 7 Words & Phrases 445 (1952) (defining "claim"). Section 1500 states "[t]he United States Claims Court shall not have jurisdiction of any claim . . . which the plaintiff . . . has pending . . . against the United States or any person who, . . . when the cause action . . . arose . . . ." Thus, "claim" and "cause of action" are used interchangeably. However, there is also no one meaning in the law for "cause of action." *See* Black's Law Dictionary 279 (4th ed. rev. 1968); 6 Words & Phrases 581 (1966) (defining "cause of action").

Lacking a plain meaning or an express definition we must look for a clear legislative intent as required by *National Railroad.* Evidence of legislative intent as to the precise meaning of "claim" is scarce. What is now 28 U.S.C. § 1500 was originally adopted as follows:

> Sec. 8. *And be it further enacted,* That no person shall file or prosecute any claim or suit in the [C]ourt of [C]laims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who,

> at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, 15 Stat. 77. Senator Edmunds, the author of the bill, explained the section as follows:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

Neither the original version of section 1500 nor Senator Edmunds' explanation gives an express definition of "claim." The intent can be inferred, however, from the subject matter jurisdictions of the Court of Claims and the district courts in 1868 when the original version of section 1500 was enacted. In 1868 the Court of Claims had exclusive jurisdiction over claims against the United States. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765; *see infra* note 8. Its jurisdiction was limited to claims upon an Act of Congress, upon regulations made pursuant thereto, or upon a contract with the United States, ex-

press or implied. *Id.* The district courts still had jurisdiction over common law claims against officers of the United States. As stated by Senator Edmunds the purpose of the section was "to put to their election . . . persons having cotton *claims* . . . who have sued the . . . agents of the Government in more than a hundred suits . . . scattered over the country . . . and at the same time endeavoring to prosecute their *claims* . . . in the Courts of Claims. . . ." 81 Cong. Globe, 40th Cong., 2d Sess. 2769 (emphasis added). Thus, Senator Edmunds, the author of the bill, inferentially defined claims to include both the actions pending in district courts and the actions filed in the Court of Claims. Due to the then existing subject matter jurisdiction, a plaintiff could not have brought his cotton claims in both courts on the same legal theory. He would have brought his action in the Court of Claims against the United States under an Act of Congress, the Captured and Abandoned Property Act of 1863,[5] and he would have brought his action in a district court against the Secretary of the Treasury or other agent of the United States under a tort theory, e.g., conversion[6] or tortious interference of a contract if the government had taken the property while in the possession of a lessee. Thus, by virtue of Senator Edmunds' explanation of the section to the Senate and the then-existing subject matter jurisdiction of the Court of

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[5] Ch. 120, § 3, 12 Stat. 820. ("And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof *in the* [*C*]*ourt of* [*C*]*laims*; . . .") (Emphasis added.)

[6] *See* Schwartz, *Section 1500 of the Judicial Code and Duplicative Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 577 (1967). Tort actions could not be brought against the United States before the enactment of the Federal Tort Claims Act, Act of Aug. 2, 1946, ch. 753, title IV, part 3, §§ 410(a), 411, 60 Stat. 843-44.

Claims versus the district courts, the term "claims" could not have referred to legal theories.[7]

The remaining legislative history is devoid of any evidence indicating the legislature's intended purpose of section 1500. In 1874 section 8 of the Act of June 25, 1868, was incorporated in the Revised Statutes of 1874, section 1067. Congress made changes in phraseology but Congressman Butler stated:

> We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate and bring together statutes *in pari materia*; so that you have here, except insofar as it is human to err, the laws of the United States under which we now live.

Remarks of Representative Butler, 2 Cong. Rec., 43d Cong., 1st Sess. 129 (1873). The version in the Revised Statutes was then adopted without change as section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138. In 1948 the language was changed to include pending suits against the United States as well as suits pending against agents of the United States. Act of June 25, 1948, ch. 646, 62 Stat. 942. Lastly, in 1982 the section was amended to continue coverage in the newly formed Claims Court. 28 U.S.C. § 1500 (1982).

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[7] Though, as indicated by Senator Edmunds, the section was originally aimed at cotton claims from the Civil War, its application has never been limited to cotton claims. Cotton claim actions were only allowed for 2 years from the end of the Civil War. Act of Mar. 3, 1863, ch. 120, § 3, 12 Stat. 820. Congress chose not to limit the duration of the original version of section 1500 to correspond with the 2-year limitation on cotton claims. Instead it was made permanent legislation and was amended over the years and as recently as April 2, 1982, 96 Stat. 40, to assure its continuing applicability from the Court of Claims to the Claims Court.

In summary, as indicated by the author of the original version of section 1500, the intent of Congress was not to define "claims" to mean legal theories. Such a definition would have rendered the section ineffective since the cotton claims towards which the section was originally aimed could not have been brought on the same theory in 1868 in both the Court of Claims and the district courts.[8] Nothing in the legislative history of the revisions of the original version is to the contrary. Under the rule of statutory construction stated in *Lorillard* and other cases cited above, and since all changes after the original version were intended as but changes in phraseology, we must presume Congress was aware of and adopted the judicial interpretations of section 1500 and its predecessors.

2. *Judicial Precedents*:

The purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time. *Wessel, Duval & Co. v. United States*, 124 F. Supp. 636, 637-38 (Ct. Cl. 1954); *Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951). The Court of Claims repeatedly applied section 1500 consistently with this purpose. This court is bound by the decisions of the Court of Claims. *South Corp. v. United States*, 690 F.2d 1368, 1369, 1 Fed. Cir. (T) 1, 1, 215 USPQ 657, 657 (Fed. Cir. 1982). The decision in *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), best states the Court of Claims interpretation of the term "claim" in section 1500. In that case plaintiff sought to recover damages or compensation for gold bullion surrendered to the Federal

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[8] The Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505, first gave district courts partial concurrent jurisdiction with the Court of Claims. *See Bates Mfg. Co. v. United States*, 303 U.S. 567, 571 (1938).

Reserve Bank pursuant to Executive orders and regulations. The plaintiff had filed both in the district court on a conversion theory and in the Court of Claims on a theory of taking property without just compensation. The Court of Claims dismissed the suit under section 154 of the Judicial Code [now 28 U.S.C. § 1500] and reasoned:

> The only distinction between the two suits instituted in the District Court and in this court is that the action in the District Court was made to sound in tort and the action in this court was alleged on contract. The facts existing and operating in both cases are the same. A recital of the operative facts relied upon by a claimant does not state two separate and distinct causes of action merely because such facts may set up a liability both in tort and contract. . . . We think it is clear that the word "claim," as used in section 154 [now 28 U.S.C. § 1500], supra, has no reference to the legal theory upon which a claimant seeks to enforce his demand . . . . The legislative history of section 154 of the Judicial code . . . supports these conclusions. 89 Ct. Cl. at 440.

The Court of Claims again considered the interpretation of the term "claim" in section 1500 in *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236 (Ct. Cl. 1957). There the plaintiff brought two actions for recovery of income and excess profits taxes. The first action was brought in the Southern District of California and the second in the Court of Claims. The district court action claimed a refund was due for the years 1940, 1941, 1942, 1943, and 1946. The Court of Claims action claimed a refund for years 1940 and 1941. *Los Angeles* held section 1500 barred its jurisdiction of the action on the ground that the same claim was pending in the district court. *Id.* at 237-38. The court reasoned it was not relevant that the district court action was brought under the theory of overpayment

of taxes and the Court of Claims action was brought under a theory of account stated. The court stated, "[t]he *claim* involved is for the refund of taxes and that claim is before both courts. The theory advanced to sustain the *claim* is quite another matter and not determinative of the jurisdiction of this court." *Id.* at 238 (emphasis in original).

Both the decision in *British American* and the decision in *Los Angeles* are explicit in their interpretation of the term "claim" in section 1500. Both reject the argument that "claim" is based on legal theories. Both hold "claim" to be defined by the facts. *British American* specifically applied this interpretation to a case involving tort and contract theories, the same theories raised in the instant appeal. A contrary interpretation would defeat the intent of Congress and would allow a plaintiff to bring duplicative actions on the same operative facts. "The possibility of inconsistent judicial resolution of similar legal issues would then exist and the dual proceedings could result in unfair burden to the defendant, and unnecessary crowding of this court's docket and general administrative chaos." *City of Santa Clara v. United States*, 215 Ct. Cl. 890, 893 (1977).[9] Accordingly, we construe the term "claim" in 28 U.S.C. § 1500 to be defined by the operative facts alleged, not the legal theories raised.

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[9] In *Santa Clara* the motion to dismiss under section 1500 was denied and the proceedings instead were stayed pending outcome of the district court case. However, this is not in conflict with the decisions in *Los Angeles* and *British American* since it follows the recognized exception stated in *Casman v. United States*, 135 Ct. Cl. 647 (1956); *accord Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684 (1980). Under *Casman*, section 1500 is inapplicable where only injunctive relief is sought in the district court. The court in *Santa Clara* did not proceed with the action as *Casman* dictates, however, since due to unique circumstances the outcome of the district court case could have resulted in funds from an escrow account (established extrajudicially) being released to the plaintiff, thus effectively duplicating the monetary award sought in the Court of Claims.

Given this construction of section 1500 we must apply it in the instant appeal. That is, do the same operative facts exist in the Robinson case or the Eastern District of Virginia third-party complaints and the Claims Court case Nos. 465-83C, 688-83C, and 1-84C? Both the complaint in the Robinson case and the complaint in Claims Court No. 465-83C allege the following: (1) the specifications of the United States required asbestos in the insulation products; (2) Johns-Manville was compelled to perform the supply contracts with the United States; (3) the United States controlled the shipyard working conditions; (4) the United States restricted access to the shipyards; (5) the United States implicitly agreed not to hold Johns-Manville liable for damages where the products were made according to the specifications; (6) the United States had a duty to enforce standards for limiting exposure to asbestos; (7) the United States had a duty to disclose its knowledge of the shipyard working conditions; (8) the United States knew of the dangers of asbestos exposure; (9) the United States failed to disclose information regarding shipyard working conditions; and (10) Johns-Manville is not liable for acts or omissions of the United States. Additionally, all the complaints, i.e., the Robinson case, the third-party complaints, and all the Claims Court cases seek recovery for costs and expenses incurred and other damages connected to suits brought by shipyard workers against Johns-Manville, alleging injury from exposure to asbestos.

The operative facts which support the several legal theories raised are therefore the same. The fact that Robinson was exposed to asbestos after 1963 rather than in WWII does not negate this. The motion of the United States to dismiss and the Claims Court's order of April 6, 1987, granting that motion, were with regard to Claims Court case Nos. 465-83C, covering exposures during WWII; 688-83C, covering post-1963 exposures; and 1-84C, covering exposures during a mixture of the two time

periods. Thus, Nos. 688-83C and 1-84C both cover exposures in the time period of the Robinson case. No. 465-83C also presents the same claim as the Robinson case due to the overlap of operative facts. In both cases the asbestos causing the injuries was sold to the United States under WWII supply contracts. It matters not that in No. 465-83C the exposure resulted from installing the asbestos and in the Robinson case the exposure resulted from removing the asbestos. In both cases Johns-Manville bases legal theories of recovery on the allegations that (1) the United States set a safety standard of limits to asbestos exposure at five million particles per cubic foot, (2) the United States had a duty to enforce this standard, (3) the United States did not enforce this standard, and (4) this breach to enforce the exposure standards was a cause of injuries to shipyard workers. Lastly, Johns-Manville agreed to try case No. 465-83C as a test case and therefore to be bound in certain other cases by the decision in 465-83C. *Johns-Manville v. United States*, 13 Cl. Ct. 72, 76-77 (1987).[10] Thus, the specific facts alleged by claimants in No. 465-83C were not so significantly different as to warrant separate trials for each indemnification action in the Claims Court. Certain other asbestos manufacturers have likewise agreed to be bound by the decision in No. 465-83C. *See Johns-Manville*, 13 Cl. Ct. at 76-77; *Keene Corp.*, 12 Cl. Ct. at 211.

Johns-Manville argues the claims are not the same since a tort theory will require different elements of proof than a contract theory. There are at least two answers to this. First, elements of proof are only relevant once a legal theory has been chosen. As previously discussed, the term "claim" in section 1500 "has no reference to the legal theory upon which a claimant seeks to enforce his demand . . . ." *British American Tobacco Co.*, 89 Ct. Cl.

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[10] Claims Court case No. 465-83C is based on four test shipyards and 15 test claimants (shipyard workers), five of whom were exposed to asbestos in shipyards after WWII. *Johns-Manville*, 13 Cl. Ct. at 77.

at 440. Since the legal theory is not relevant, neither are the elements of proof necessary to present a prima facie case under that theory. Second, the Court of Claims in *Los Angeles* expressly rejected this argument of appellant. *See Los Angeles*, 152 F.Supp. at 237-38.

In the latter case, the plaintiff argued section 1500 was not applicable since the proof required in each court would be different. In the district court, under the theory of overpayment of taxes, the proof would relate to the correctness of the characterization of many items as being or not being income or expenses. In contrast, the proof in the Court of Claims, under the theory of an account stated, would relate to the existence of an agreement resolving conflicts between the plaintiff and the Commissioner of Internal Revenue. The court rejected plaintiff's argument on the ground the claims were both the same, the refund of taxes, regardless of the different theories or different elements of proof. Accordingly, we also reject this argument.

B. *The Effect of Involuntary Election*

Johns-Manville argues that section 1500 is not applicable where the plaintiff cannot elect to bring all its theories of recovery in one court. In the instant appeal both tort and contract theories cannot be brought in one court, since the district courts have exclusive jurisdiction of tort actions against the United States and the Claims Court has exclusive jurisdiction of contract actions exceeding $10,000 against the United States.[11] 28 U.S.C. §§ 1346(a)(2)-(b), 1491 (1982). However, the legislative history and the cases indicate section 1500

[11] Johns-Manville's argument is not that section 1500 always forces an election but that it may effectively and improperly do so where the statute of limitations runs on the district court action before the Claims Court action is concluded. The statutes of limitations for the FTCA and the Tucker Act are 2 and 6 years, respectively. 28 U.S.C. §§ 2401(b), 2501 (1982).

was enacted for the benefit of the government and was intended to force an election where both forums could grant the same relief, arising from the same operative facts. *See supra* statement of Senator Edmunds, author of the original version of section 1500, stating "[t]he object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts." *See also Brown*, 358 F.2d at 1005; *Casman*, 135 Ct. Cl. at 649.

The Court of Claims held in *Wessel*, 124 F. Supp. at 638, that a plaintiff has no vested right to proceed in two courts. In *Wessel*, as in the instant appeal, the plaintiff filed in two courts alleging jurisdiction under two separate Acts of Congress [12] arising from the same operative facts. As in the instant appeal, the plaintiff in *Wessel* argued section 1500 should not bar the Court of Claim's jurisdiction under 28 U.S.C. § 1491. That is, section 1500 should not apply since filing in only one court on one Act of Congress might result in the statute of limitations expiring under the other Act of Congress.[13] The Court of Claims rejected this argument and stated:

> Although plaintiff's desired result is an appealing one, we believe the language of 28 U.S.C. 1500 is quite explicit and to defer action in this court would foster just the type of occurrence which section 1500 was enacted to prevent, i.e., the maintaining of two

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[12] These Acts raised in *Wessel* were the Tucker Act, 28 U.S.C. § 1491, and the Admiralty Act, 46 U.S.C. §§ 741-752, or, alternatively, the Public Vessel Act, 46 U.S.C. §§ 781-790. *Wessel*, 124 F. Supp. at 637.

[13] The Admiralty Act is unique in that it has been expressly interpreted to provide an exclusive remedy for all claims falling under its subject matter. The question of which court to file in was, however, an important problem until transfer of cases was allowed. 28 U.S.C. § 1631 (1982); *see generally United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976).

> suits against the United States on the same claims and at the same time in two different courts.

124 F. Supp. at 637-38.

The court in *Wessel* additionally reasoned that where a statute was solely jurisdictional, as is section 1500, the tribunal affected could make no exceptions by granting jurisdiction. Quoting *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953), the court stated:

> "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit."

124 F. Supp. at 638. The issue of whether section 1500 may or may not have caused unexpected results by forcing an election between courts on only one theory or the other does not affect the efficacy of section 1500. The Supreme Court in *Insurance Co. v. Ritchie* stated:

> It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

72 U.S. (5 Wall.) 541, 544 (1866) (footnote omitted). 28 U.S.C. § 1491(a)(1) (1982) states, "[t]he United States Claims Court *shall have jurisdiction* . . . upon any claim against the United States founded . . . upon . . . any express or implied contract with the United States . . . ." (Emphasis added.) 28 U.S.C. § 1500 (1982) states, "[t]he United States Claims Court *shall not have jurisdiction* of any claim . . . which the plaintiff . . . has pending in any other court . . . against the

United States . . . ." (Emphasis added.) 28 U.S.C. § 1491(a)(1) clearly grants jurisdiction and 28 U.S.C. § 1500 just as clearly takes jurisdiction away where the stated condition is met. There is no justifiable reason why the rule expressed by the Supreme Court in *Ritchie* is not applicable where the repeal is conditional rather than absolute.

Johns-Manville cites no authority for rules of statutory construction negating the efficacy of section 1500. Instead, Johns-Manville stresses principles of equity. It argues barring jurisdiction would be "fundamentally unfair," "contrary to a 'reasonable and just construction,'" "would force Johns-Manville to elect, at its peril," a "'harsh' and 'literal interpretation.'" Principles of equity do not support finding jurisdiction exists. A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists. *Christianson v. Colt Indus. Operating Corp.*, 56 U.S.L.W. 4625, 4630 (U.S. June 17, 1988) (vacating a decision by the Federal Circuit for lack of jurisdiction).

Appellant next argues that 28 U.S.C. § 1346(a)(2)-(b), creating parallel jurisdiction with the Claims Court and district courts in contract claims under $10,000 but exclusive jurisdiction in district courts in all tort claims, was enacted after the original versions of 28 U.S.C. § 1500. Thus, it is argued that Congress created an implicit exception to section 1500. This argument is without merit. 28 U.S.C. § 1346(a)(2)-(b) is no limitation on the jurisdiction of the Claims Court. It only creates district court jurisdiction. Nor does section 1500 bear on the jurisdiction of the district courts.[14]

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[14] *Cf.* 1 U.S.C. § 109 (1982) (reversing common law rule that a later criminal statute implicitly repeals an earlier statute where the later statute embraces the whole subject matter of the first statute and contains no savings clause. *E.g., United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870).

The possibility that the statute of limitations may run on one theory while the other theory is being prosecuted is the only substantive basis for Johns-Manville's argument that section 1346(a)(2)-(b) is repugnant to section 1500. As already discussed, Court of Claims precedent which is binding on us has expressly rejected this argument. *Wessel*, 124 F. Supp. at 636. The Supreme Court has also rejected this argument. In *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), the Court affirmed a dismissal by the Court of Claims under section 154 of the Judicial Code, section 1500's predecessor. In *Corona*, as in the instant appeal, the plaintiff argued that the actions were brought to stop the statute of limitations from running. The Supreme Court stated:

> But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases.

Id. at 540 (citations omitted).

Thus, the Court of Claims in *Wessel* and the Supreme Court in *Corona* have considered and rejected the *ex necessitate rei* statute of limitations argument. Johns-Manville's reliance on *Prillman v. United States*, 220 Ct. Cl. 677 (1979); *Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976); and *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), for the contrary proposition is not persuasive. In both *Brown* and *Prillman* section 1500 was not applicable because of the *Casman* exception which applies where a different type of relief is sought in the district court (equitable) from that sought in the Court of Claims (money). *See Casman v. United States*, 135 Ct. Cl. 647 (1956). In the present case, however, the relief sought from both courts is money, but under different theories. The operative facts of the claims are the same.

In *Brown* the plaintiff originally sought monetary damages and equitable relief in the district court. However, the district court dismissed the plaintiff's monetary claim for lack of jurisdiction. Thus, only the equitable count remained in the district court, a cause over which the Court of Claims had no jurisdiction. Also in *Prillman* the plaintiff requested from the district court both equitable and monetary relief. The request for back pay was in excess of $10,000. *Prillman*, 220 Ct. Cl. at 678. As stated in 28 U.S.C. § 1346(a)(2) and as recognized by *Prillman*, *id.* at 679, a district court's concurrent jurisdiction with the Claims Court is limited to claims not exceeding $10,000. Thus, both *Brown* and *Prillman* merely follow the exception to section 1500 originating in *Casman* and do not support any other exception to section 1500.

The Court of Claims stated in *Allied*:

> Since we have no jurisdiction of suits under the Anti-Trust laws, suits under state common law for tortious interference with contracts, or suits under 40 U.S.C. Sec[s]. 488 and 489, and the District Court by 28 U.S.C. Sec. 1346 (2), has no jurisdiction of breach claims over $10,000, plaintiff has no election. In neither court could it combine all its claims. In these circumstances Sec. 1500 does not support the so-called motion to dismiss.

210 Ct. Cl. at 715-16.

The precedent and rationale expressed by *Allied* indicates that decision was only following the established exception under *Casman* to section 1500. The *Allied* decision cites only two precedents, *Matson Nav. Co. v. United States*, 284 U.S. 352 (1932), and *Casman*, 135 Ct. Cl. at 647. *Matson* held that section 1500's predecessor, section 154 of the Judicial Code of 1911, could not be expanded to bar pending suits on the same claim against the United States since the language of the

section only referred to pending suits against agents of the United States.[15]

It is not evident to us that *Allied* intended to extend the exception established in *Casman* to cover pending cases seeking monetary relief so long as the Court of Claims had no jurisdiction over the legal theories asserted in the district court. *Allied* does not state the plaintiff is seeking monetary relief in the pending district court cases. Nor does *Allied* discuss any of the precedents which would need to be overruled or distinguished before reaching the holding Johns-Manville argues *Allied* reaches. In summary, we find Johns-Manville's reliance on *Allied* unfounded since it does not clearly hold section 1500 is inapplicable where the pending suit seeks monetary relief in both courts on the same operative facts.

In conclusion, we hold that under 28 U.S.C. § 1500 the relief sought by Johns-Manville in the Robinson case is based on a "claim for or in respect to" the claims brought by Johns-Manville in the Claims Court in Nos. 465-83C, 688-83C, and 1-84C.[16]

II. *The Effect of a Stay on the Interpretation of "[P]ending"*

Johns-Manville argues that since the Robinson and third-party complaint cases are stayed they are not "pending" as required by section 1500. Therefore, it is contended that section 1500 is inapplicable even if the

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[15] In 1948 the language was changed to include pending suits against the United States as well as suits pending against agents of the United States. Act of June 25, 1948, ch. 646, 62 Stat. 942.

[16] It is not necessary to the disposition of this case to discuss whether the Eastern District of Virginia's third-party complaints also contain "claims for or in respect to" claims in the Claims Court cases. Our discussion of section 1500 as it applies to "before-filed" cases such as the Robinson case applies to all similar cases seeking the same relief.

claims are the same. However, the use of "pending" in section 1500 is unambiguous.

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. . . . Construction may not be substituted for legislation.

United States v. Missouri Pac. R.R., 278 U.S. 269, 277-78 (1929). This is the standard rule of statutory construction which has been followed innumerable times both by the Supreme Court and by this court and its predecessor courts.

The plain meaning of "pending" includes cases which have been filed but stayed. The Court of Claims has considered this issue. In *National Cored Forgings Co. v. United States*, 132 F. Supp. 454 (Ct. Cl. 1955), the plaintiff stipulated for a stay of proceedings in the district court until final action had been taken in the Court of Claims. *Id.* at 457. The Court of Claims held section 1500 applied to bar jurisdiction since the same claim was pending in a district court. Accordingly, we hold the Robinson case is pending under section 1500.

CONCLUSION

Claims are the same where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court. *Johns-Manville Sales Corp. v. United States*, No. C81 4561 RFP (N.D. Cal. filed Dec. 7, 1981) (the Robin-

son case), does contain pending claims for or in respect to the Claims Court case Nos. 465-83C, 688-83C, and 1-84C. 28 U.S.C. § 1500 bars jurisdiction of the Claims Court over claims pending in a prior-filed case in another court. Therefore Claims Court jurisdiction is barred over case Nos. 465-83C, 688-83C, and 1-84C. An exception exists under *Casman v. United States*, 135 Ct. Cl. 647 (1956), where a type of relief not available in the Claims Court is sought in the other court. This exception is inapplicable in the instant appeal. Finding neither legal error nor abuse of discretion in the order of the Claims Court, we affirm.

AFFIRMED

NICHOLS, *Senior Circuit Judge*, dissenting.

With all respect I cannot join in this per curiam opinion, and I dissent instead for the reasons given below.

O. W. Holmes, *J.* wrote for the Court in *United States* v. *Emery*, 237 U.S. 28, 32 (1915):

> [It is an] inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. [Citations omitted.]

The "great act of justice" means, of course, the Tucker Act, 24 Stat. 505, Act of March 3, 1887, now 28 U.S.C. § 1491, and other sections, as selected by codifiers. Holmes' language was not mere words; it explained a decision construing the Tucker Act to embrace suits for tax refunds previously held not consented to. *See* II *Court of Claims History* 43 (1976). A view contrary to that of Holmes as often or more often prevails, of which the type is the pronouncement in *United States* v. *Testan*, 424 U.S. 392, 399 (1976), repeating prior statements there quoted:

> [I]n a Court of Claims context, * * * a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." [Citations omitted.]

The instant per curiam decision reflects the same tension between the two opposing ideas and it is reflected also in the cases it cites, some of which appear guided by the former, and some of the latter, principles. Title 28 U.S.C. § 1500 is not derived from the general revision and strengthening of the jurisdictional, consent to be sued, and limitation on the consent to be sued, provisions, all embodied in the 1887 Tucker Act. As the per curiam indicates, it was at that date in the revised statutes and apparently was overlooked by the Tucker Act's authors, though other limitations were not: for example, the pro-

hibition on suits on pensions, right next to section 1500 in the present code, 28 U.S.C. § 1501, and on suits based on treaties, now 28 U.S.C. § 1502. The codifiers have not overlooked section 1500, but how much consideration by Congress it really has received since 1868 is unclear. The purpose was then stated, but that purpose has evaporated since at present the United States is considered a necessary party to suits for money that will have to be paid out of the United States Treasury. It is to be supposed Congress has maintained section 1500 in the statute books all these years it must be for other reasons, but we are in the dark as to what these other reasons might be.

This is particularly important because the word "claim" is one of the most protean words in the language, and any statute built, as section 1500 is, around the word "claim," is necessarily ambiguous. Interpretation of section 1500 can and does vary according to whether two differing assertions of right in two courts are deemed one claim or two.

As we have no light cast by the Congress, we look to construing court decisions, and they are numerous. Manifestly, section 1500, is not part of the Tucker Act, has been virtually made so by the codifiers, and the ambivalence of the courts is fully applicable. It is obvious that section 1500 is a serious roadblock for claimants against the United States if, as here, they have some claims enforceable only in the Court of Claims/Claims Court, and what may be the same claims, enforceable only in courts other than the Court of Claims/Claims Court. The claimants then will have to show, if they can, that what may be the same claims for some purposes may well be different claims for other purposes. One's idea of what is a different claim, and what is the same claim, may be influenced consciously or unconsciously by one's perception as to whether one's duty as a judge is to facilitate treating the claimant against the government in all respects

the same as a claimant against General Motors, so far as the statutes will allow, or to meet any assertion the government has waived its sovereign immunity with crabbed hostility. The former is the Holmsian approach, the latter that of the per curiam opinion herein. We have the statute, and we must give it effect, but what effect we give it depends on how we construe it where it is ambiguous.

In *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), the Court of Claims confronted a problem since eliminated: the Tucker Act, as it then was, consented to suits for back pay in the Court of Claims by employees alleging they were wrongfully fired, but they had to go to United States District Courts to get the order of reinstatement which most such claimants wanted. They could sue in the district court for money damages also under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), but if they did, they would have to waive any money claimed over $10,000. The Court of Claims held section 1500 did not bar the maintenance of both suits in this situation, explaining section 1500 was only intended to "require an election," quoting *Matson Nav. Co.* v. *United States*, 284 U.S. 352, 355-56 (1932), and deeming that the fired employee had no election and therefore section 1500 did not apply to him. That was a holding the claims were not the same because election was not possible.

Here by *Casman* reasoning, the claimant, Johns-Manville, has no election either, because it cannot sue the United States on its tort claim in the Claims Court, or on its contract claim in any other court, in view of its magnitude. The court does not so reason because apparently it sees the *Casman* decision and its progeny as a sort of arbitrary happening inexplicable under the kind of analysis it deems the only kind possible. *Casman* is, however, cited and followed in *Truckee-Carson Irrigation District*, 223 Ct. Cl. 684 (1980). I see *Casman* as merely and simply Holmsian. The court herein pro-

fesses to see a difference between claims based on the same "operative facts" if one seeks money relief and th other injunctive relief, that does not exist if one seeks contract relief and the other tort relief. The real explanation I fear is that the court construes the word "claims" in a manner unfavorable to the claimant because it elects to view the statute "strictly and with an adverse eye."

The court insists on repeating that the tort and contract claims of Johns-Manville against the government are "based on the same operative facts." If the "operative facts" in this situation are the facts the claimant must prove to establish the claims, obviously they are not the same. For a contract claim the "operative facts" must include a showing that a contract was made, express or implied in fact. No such requirement exists in a tort case, but in the normal situation, which this is, the action proceeds on a negligence theory and the "operative facts" will include a showing that a duty of care arose, not from contract, but from circumstances where injury to others was foreseeable.

British American Tobacco Co. v. *United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), is one where no such difference existed in the "operative facts." The case was one of the many "gold clause" cases that followed the United States going off a gold-backed currency in the 1930's. Plaintiff had delivered gold to the Federal Reserve Bank and received currency, but not as much as it asserted the gold was worth. It sued in the district court on a tort theory, alleging not negligence, but an unlawful conversion. It sued in the Court of Claims on a taking theory. It is clear the difference was not in the operative facts, or any of them, but only in the legal theory pursued. The court said at 440 "[t]he facts existing and operating in both cases are the same." The court holds a difference in legal theory does not save claimant from section 1500, as it now is, if the "opera-

tive facts" are the same. It is evident the difference between the claims would be whether the currency paid for the gold was the lawful amount. If it was, by claimant's legal theory it was a taking case; if it was not, it was a conversion.

I do not think *British American* can fairly be taken as authority that tort and contract claims are the same claim for section 1500 purposes where only some of the "operative facts" are the same and others are different. It is clear that section 1500 cannot be frustrated by an artful pleader who puts different legal labels on what really is the same claim. There is no reference to the question of election or to the possibility *British American* would have had to drop one or the other of its legal theories, but the Court of Claims, by the date of *Casman*, had by then tumbled to the notion that section 1500 only requires an election when parties have an election. It learned that from *Matson Nav. Co., supra*, a later case. So far as in *British American*, the court proceeded to a decision in disregard of whether that claimant had an election, the precedent may be treated as modified by later cases.

Los Angeles Shipbuilding & Drydock Corp. v. *United States*, 152 F. Supp. 236, 138 Ct. Cl. 648 (1957), is not a case where the court disregarded the nonexistence of an election. It involved, as this court states, claims for tax refunds in the Court of Claims and in the district court for some of the same years on two different legal theories. Plaintiff could have pursued its case on both theories in either court as the Court of Claims said at 652:

> The plaintiff could have pursued its claim on the theory of account stated alternatively to its other theories of recovery in the District Court or in the Court of Claims. Either course of action was available to plaintiff. It made its choice of the

tribunal desired, the District Court, and therefore cannot now be heard in this court.

My conclusion is that because of the ambiguity inherent in the word "claims," claims provable by different facts, and characterized respectively as tort and contract claims, would have been treated by the old Court of Claims as different claims if a claimant could not sue on both theories in any one court. This court's decision, to the contrary, is a departure from precedent and an unseemly swing to the policy of erecting roadblocks against claimants seeking to assert a government liability, though such blocks would not exist in the case of a suit against a private company. This is particularly painful in the present case as the results of many months of trial are voided and made useless. If Congress intended this, we have no choice, but we make Congress look extremely bad. If it did not intend this, we take on ourselves a heavy responsibility.

The court is also unacceptably hostile to jurisdiction in that it disregards this question: suppose Johns-Manville has incurred expense and pursues indemnification for settling with asbestosis sufferers A, B, and C. Is this one claim or three? As a further complication: suppose the payments to A, B, and C are sued for in the district court, but left out of the Claims Court suit and instead Johns-Manville pursues indemnification in the Claims Court for settling with D and E? I am inclined to think this court would say it is all one claim under this hypothetical, because it would say the "operative facts" were the same. To this I emphatically disagree. I think the asserted right to indemnification is a separate claim for each person settled with. Even if I am wrong in making anything turn on the plaintiff not having an election, I would still think the Claims Court should be directed to allow amendment so that indemnification for settling with individuals can be pursued in one court, or the other, even if not allowed in both.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

August 29, 1988

ERRATUM

Appeal No. 87-1332—JOHNS-MANVILLE CORPORATION and JOHNS-MANVILLE SALES CORPORATION v. THE UNITED STATES

Published: August 25, 1988

Please make the following change:

Page 20, footnote [13], should read:

The Admiralty Act is unique in that it has been expressly interpreted to provide an exclusive remedy for all claims falling under its subject matter. The question of which court to file in was, however, an important problem until transfer of cases was simplified by 28 U.S.C. § 1631 (1982) permitting transfers between all federal courts "in the interest of justice" when the first filing was in a court without jurisdiction. *See generally United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976).

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

Nos. 579-79C & 585-81C

(Filed April 6, 1987)

KEENE CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Nos. 465-83C, 688-83C & 1-84C

JOHNS-MANVILLE CORPORATION *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

No. 170-83C

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 287-83C

GAF CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 16-84C

UNR INDUSTRIES, INC., *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

No. 514-84C

FIBREBOARD CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 515-85C

H.K. PORTER COMPANY, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Filed April 6, 1987

Harvey G. Sherzer, Washington, D.C., with whom were *Robert M. Bruskin*, *Lewis M. Barr*, *Charles H. Samel*, and *Anne M. Quigley*, Howrey & Simon, for plaintiffs in Nos. 465-83C, 688-83C & 1-84C. *Dennis H. Markusson*, *Robert D. Batson*, and *Nancy E. Stead*, Manville Corporation, Littleton, Colorado, of counsel.

H. Michael Semler, Washington, D.C., with whom were *Benjamin A. Dinkins*, *Harold J. Engel*, and *Assistant Attorney General Richard K. Willard*, for defendant.

ORDER

NETTESHEIM, Judge.

Defendant has moved to dismiss all the captioned actions other than *UNR Industries, Inc., et al.*, No. 16-84C, for lack of jurisdiction based on 28 U.S.C. § 1500 (1982). An order entered on February 13, 1987, limited the intial ruling on defendant's motion to the three cases pending as *Johns-Manville Corp. et al.*, Nos. 465-83C, 688-83C & 1-84C, because trial in No. 465-83C was scheduled to begin on April 20, 1987. Argument has been heard.[1]

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[1] Five of the other plaintiffs in these asbestos cases potentially are affected by the order entered herein. The court will not decide defendant's motion as to these plaintiffs until defendant has briefed further the issue whether the same claims are pending both in district courts and this court. However, it can be stated with some assurance that Keene Corporation, Nos. 579-79C & 585-81C, and Fibreboard Corporation, No. 514-84C, filed similar cases in other courts after having commenced their litigation in the United States Court of Claims or this court. Eagle-Picher Industries, Inc., No. 170-83C, and H.K. Porter Company, Inc., No. 515-85C, filed similar actions both before and after suing in the Claims Court. GAF Corporation, No. 287-83C, sued in district court one day after filing its similar action in the United States Claims Court. Overall, the direct, third-party, and omnibus actions brought by all plaintiffs that are pending in district courts total over 300 separate cases.

The genesis of defendant's motion was an order entered *sua sponte* on January 20, 1987, directing defendant to state its position on the applicability of 28 U.S.C. § 1500 concerning litigation brought by plaintiffs Johns-Manville Corporation and Johns-Manville Sales Corporation (collectively referred to as "Johns-Manville"). It is regrettable that this court raised the matter at such a late date. The earliest of the Johns-Manville cases was filed in 1983, and this court received them on transfer in July 1986. After defendant on January 15, 1987, described pending litigation in the United States District Court for the Northern District of California (which had been pending since 1981), this court, impressed with the similarity of the claims, entered its January 20, 1987 order.

For its part defendant's failure to file its motion earlier is outrageous. On August 1, 1980, defendant moved for summary judgment in *Keene Corp.*, Nos. 579-79C & 585-81C, based *inter alia*, on 28 U.S.C. § 1500. According to one of defendant's counsel, the argument was abandoned for "tactical reasons" in defendant's reply brief. Declaration of Paul Honigsberg, Feb. 26, 1987, ¶ 3. Defendant also referred to 28 U.S.C. § 1500 in 1983 in connection with a motion to dismiss in the nature of a motion for a more definitive statement filed with respect to *Eagle-Picher Industries, Inc.*, No. 170-83C. The Government had elected not to pursue a section 1500 motion at that time, ostensibly because the pleadings were too indefinite. Declaration of Robert M. Hollis, Feb. 27, 1987, ¶¶ 3, 5. Signicantly, defendant does not take the position that it was unaware that grounds existed to support a motion based on 28 U.S.C. § 1500 in the *Eagle-Picher* case; nonetheless, six weeks before the scheduled trial in the lead case, defendant demands dismissal of Johns-Manville's cases in this court unless Johns-Manville dismisses all of its direct and third-party litigation against the United States in federal district court.

As a court of limited jurisdiction, the United States Claims Court must be acute to statutes that deprive it of

jurisdiction, such as 28 U.S.C. § 1500, which precludes the exercise of jurisdiction with respect to claims against the United States that are also pending in other courts. Even though section 1500 may be harsh, *see Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924), the timing of the motion urging that the court refrain from exercising its jurisdiction was a matter within defendant's control. A jurisdictional motion can be made at any time, but it is unclear whether defendant would have waited until the case was presented to the United States Supreme Court to point out that the trial court lacked jurisdiction to proceed.

BACKGROUND

The potentially affected parties in the asbestos cases pending in this court are displeased that the court *sua sponte* raised 28 U.S.C. § 1500 after they had engaged in extensive and costly pretrial proceedings since 1983. The record discloses, however, that no court has ruled, *sub silento* or expressly, on the subject. In these circumstances prudence dictates resolving all jurisdictional issues before trial.

In order to understand the labyrinthine procedural history of this issue, some terms shall be defined. "Later-filed suits" refer to actions filed elsewhere after suit was filed in the United States Court of Claims or United States Claims Court. "Earlier-filed suits" refer to actions filed in other courts before a case was commenced in the Court of Claims or Claims Court.

With respect to suits filed after actions were begun in the Court of Claims or Claims Court, defendant argued in its August 1, 1980 moving brief in *Keene Corp.*, No. 579-79C, that 28 U.S.C. § 1500 barred the prosecution in the Claims Court of suit on the same claim later filed in district court. After defendant abandoned this argument on reply, the Court of Claims issued an unpublished order that did not discuss the issue. *Keene Corp. v.*

United States, No. 579-79C (Ct. Cl. May 1, 1981) (per curiam) (order denying motion for summary judgment and granting leave to file first amended petition). This court ruled recently in *Johns-Manville Corp. v. United States*, No. 465-83C, slip. op. at 17-19 & n.2 (Cl. Ct. Mar. 6, 1987) (order granting and denying motion for judgment on the pleadings), that the May 1, 1981 order should be accorded law of the case effect as to its ruling that several breach of contract claims were cognizable by the Court of Claims, but declined to adhere to the doctrine insofar as the May 1, 1981 order allowed a claim for breach of a warranty of safe use. However, law of the case does not enter the picture when the judicial utterance is silent. *See Argus-Chemical Corp. v. Fibre Glass-Evercoat Co.*, No. 86-1444 (Fed. Cir. Feb. 26, 1987) (additional views of Nies, J.) (trial court correctly perceived that Federal Circuit's silence on issue was not law of the case); *cf. International Elec. Corp. v. United States*, 2 Cl. Ct. 570, 573, *aff'd mem.*, 727 F.2d 1120 (Fed. Cir. 1983) (published opinion of Court of Claims appellate division considered law of the case by successor Claims Court when prior court expressly considered issue and said that it was unnecessary to reach it; Court of Claims also had denied motion for reconsideration on same ground); *Department of Natural Resources & Conservation v. United States*, 1 Cl. Ct. 727, 731 n.2 (1983) (decision on jurisdictional argument considered and rejected in published order of Court of Claims law of the case in same case before successor Claims Court).

Moreover, the Court of Claims knew how to reject a section 1500 argument when defendant abandoned it on reply. In *Camero v. United States*, 170 Ct. Cl. 490, 493, 345 F.2d 798, 800 (1965), the Court of Claims said:

> In the case at bar, defendant had included as one ground for its motion for summary judgment the assertion that, by virtue of 28 U.S.C. § 1500, the filing of the district court suit took away the juris-

> diction of this court. At the time of oral argument of the present case, defendant announced that it had abandoned its position on jurisdiction. Furthermore, for the reasons expressed in *Tecon Engineers, Inc. v. United States*, ante, at p. 389, 343 F.2d 943, we hold that, regardless of the degree of similarity between the suit in the district court and the case at bar, the filing of the action in the district court did not affect the jurisdiction of this court over the present case.

(Footnote omitted.) *Camero* strongly suggests that the Court of Claims in *Keene Corp.* would have rejected defendant's argument based on section 1500 had it not been abandoned (or had defendant so announced at argument). (Correspondingly, Court of Claims precedent would have dictated the rejection of Keene Corp.'s weak argument that its claims were different merely because they sounded in tort in district court and contract in the Court of Claims.) Because the May 1, 1981 order was silent on the subject of section 1500, the consequence is that defendant has not made the same argument concerning later-filed cases before to the Court of Claims and obtained a ruling on it.

With respect to actions filed in other courts before suits on the same claims were filed in the Claims Court, defendant raised section 1500 again in 1983 before Judge Lydon in *Eagle-Picher Industries, Inc.*, No. 170-83C. (Although defendant's motion in the nature of a motion for more definite statement was consolidated for decision with a motion to dismiss in *GAF Corp.*, No. 287-83C, defendant's motion against *GAF* did not mention section 1500.) Defendant's moving papers in *Eagle-Picher* say that defendant viewed itself as hampered from making a section 1500 motion because the complaints were nonspecific as to the particular judgments and settlements sued on. *See* Def's Br., No. 170-83C, filed May 24, 1983, at 5, 16-17, 19. Judge Lydon's order in *Eagle-Picher*

Industries, Inc. v. United States, No. 170-83C (Cl. Ct. Sept. 15, 1983) (order denying motion to dismiss), did not speak to section 1500.

Neither the 1981 *Keene* order nor the 1983 *Eagle-Picher* order is law of the case on section 1500. More to the point is plaintiffs' contention that defendant lulled them along for over three years. That is correct. Plaintiffs also are correct that the Court of Claims decision in *Tecon Eng'rs, Inc. v. United States*, 170 Ct. Cl. 389, 343 F.2d 943 (1965), *cert. denied*, 382 U.S. 976 (1966), is controlling and binding authority that section 1500 does not apply in respect to later-filed suits. *Tecon Engineers* and its progeny encouraged plaintiffs that they would be allowed to pursue the same claims as torts in district court as long as their Claims Court contract actions were filed earlier. If the Federal Circuit is to reexamine *Tecon Engineers* after over 20 years, these are the cases in which to do it. Defendant has expended awesome personnel and monetary resources to defend the same claims at the same time in the Claims Court and district courts.

There was justification for some delay in raising section 1500. With respect to later-filed suits, *Tecon Engineers* would have been dispositive of any motion before the Court of Claims. However, defendant could have moved in *Keene Corp.* after the case was transferred to the Claims Court in late 1982 and asked Judge Lydon to certify the question to the Federal Circuit, since *Tecon Engineers* is binding on the Claims Court. With respect to earlier-filed suits, defendant said in 1983 before Judge Lydon that it was confronted in *Eagle-Picher Industries, Inc.*, No. 170-83C, with "18,000 separate suits for indemnity." Def's Br. filed July 3, 1983, at 7. On this basis defendant had argued in its moving brief that without more information as to claims and amounts of settlements or judgments it could not judge the applicability of 28 U.S.C. § 1500. Judge Lydon took the reins in his

September 15, 1983 order by instructing the parties that the case should proceed on a representative basis:

> [I]t is felt that the better answer to handling these potentially large and complex litigations is for counsel to work together to reach agreement on an approach that will enable the matters to be tried on a representative basis so as to present for determination the issues the parties feel will dispose of the litigations without the necessity of dealing with every identical contract and every judgment and settlement. It would seem unreasonable to have to deal with contracts between the parties going back to the 1930's and with some 34,000 judgments or settlements. If representative situations, agreed to by the parties, can be set forth in detail, and tried if necessary, much needless work, time and expense of all concerned can be avoided. The court stands ready to work with counsel in this regard.
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> It is further ordered that counsel for the parties commence working on efforts to reach a representative approach to litigating the matters in suit. . . .

Eagle-Picher Industries, Inc. v. United States, No. 170-83C, slip op. at 3. Thus, only after this order entered and the parties commenced to develop test cases was defendant in a position to argue that 28 U.S.C. § 1500 bars Claims Court jurisdiction over test cases when the same claims are pending elsewhere differentiated only by facts particular to different claimants, shipyards, and contracts. This possible justification, of course, does not excuse filing the motion in 1987.

Defense counsel forthrightly stated in argument that this court's suggestion prompted its motion, so that any justification is not claimed. The equities preponderate in Johns-Manville's favor. Jurisdictional determinations may not be tempered by notions of equity, but the en-

forcement of jurisdictional orders should be influenced by considerations of fairness. The order that follows has been fashioned in this spirit.

FACTS

1. *Theories of relief in cases brought by Johns-Manville*

The earliest of the non-Claims Court cases brought by Johns-Manville, *Johns-Manville Sales Corp. v. United States*, No. C 81 4561 RFP (N.D. Cal., filed Dec. 7, 1981), sought recovery of amounts Johns-Manville had paid to defend and settle a claim by John C. Robinson for injuries allegedly suffered from exposure to absestos-containing products supplied by Johns-Manville under contract with the Government. This case will be referred to as "the Robinson case." The complaint pleaded claims under the Federal Tort Claims Act, §§ 1346(b), 2671-2680 (1976), based on the Government's negligence with regard to asbestos-containing products; negligence in breaching an implied warranty of fitness of the asbestos sold to Johns-Manville and an implied warranty of safety based on the Government's design of asbestos-containing products; and negligence in failing to reveal superior knowledge of the health hazards associated with asbestos. The complaint also alleged a fifth amendment taking. All of these claims except the taking claim were dismissed by order of January 27, 1983, for failure to file an administrative claim, as required by the Federal Tort Claims Act. The taking claim, as well as a later-added maritime law claim, were dismissed by order of December 17, 1984, following Johns-Manville's voluntary agreement to withdraw them. By order dated January 9, 1984, the court granted Johns-Manville's motion to file an amended complaint after an adequate administrative filing of its tort claims had been made.

The amended complaint, filed on January 19, 1984, made four claims under the Federal Tort Claims Act and

one under the fifth amendment. Johns-Manville alleged that Mr. Robinson's injuries resulted from the Government's breach of duty owed both to Johns-Manville and to Mr. Robinson as a vessel owner to exercise due care in the use of asbestos-containing products. The government allegedly breached implied warranties that 1) Johns-Manville would not be held liable for damages resulting from compliance with government-mandated specifications and 2) asbestos-containing products would be used in a safe manner. Johns-Manville also revived its taking claim, but later dropped it along with its admiralty claim in responding to the Government's motion to dismiss the amended complaint. *See Johns-Manville Sales Corp. v. United States*, 662 F. Supp. 443, 445 n.2 (N.D. Cal. 1985) (order denying motion to dismiss). In ruling on that motion, the district court held that the remaining claims were viable, but required that Johns-Manville plead proximate causation more specifically. *Id.* at 443. Johns-Manville complied in a second amended complaint filed on October 3, 1985. The district court is now considering defendant's motion to reconsider the denial of its motion to dismiss or to certify the order for interlocutory appeal.

There are 59 cases pending in the Eastern District of Virginia in which Johns-Manville and other asbestos-product manufacturers have brought in the United States and a shipyard operator as third-party defendants. Johns-Manville says that these cases were filed prior to August 26, 1982, which is prior to commencement of its Claims Court cases. These third-party actions allege that the asbestos-product manufacturers, defendants and third-party plaintiffs, are entitled, if found liable for the individual plaintiffs' claims for asbestos-related injuries, to indemnification by the United States, third-party defendant, since the manufacturers' negligence was secondary to that of the Government's The manufacturers charge that the Government specified asbestos-containing products for use in the shipyard, supplied the products to the shipyard,

determined their use in the shipyard, supervised the work, inspected the facilities, and was responsible for maintaining a safe working place. Claims for breach of warranties of safe use, merchantability, and fitness for a particular purpose are pleaded, and Johns-Manville also claims that the Government breached its duties to maintain a safe work place and to enforce health standards.[2]

Based on the same theories as in the Robinson case, *Johns-Manville Sales Corp. v. United States.*, No. C83-798T (W.D. Wash., filed Oct. 15, 1982), sought indemnification of amounts paid to Leonard Herrman. The case was dismissed for lack of prosecution on September 27, 1984.

The filing of three cases in the Claims Court then followed. Johns-Manville sought in each suit indemnification for amounts that it had paid or may be liable to pay to individuals in settlement of claims for injuries allegedly caused by exposure to asbestos-containing products. The first complaint *Johns-Manville Corp. et al. v. United States*, No. 465-83C (Cl. Ct., filed July 19, 1983), made ten claims, one of which Johns-Manville has dropped. Indemnification was sought for Johns-Manville's liabilities for injuries to shipyard workers from exposure to asbestos during World War II based, *inter alia*, on an implied contract to indemnify created by 1) the mandatory nature of the contracts to supply asbestos, 2) the parties' intent that Johns-Manville not bear liability for injuries, 3) the Government's control of shipyard conditions, 4) the bailment by the Government of asbestos, and 5) limitations placed by the Government on the amount of liability insurance war contractors could carry. Additionally, Johns-Manville based claims on implied warranties that products complying with contract specifications would be

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[2] The foregoing is drawn from the third-party complaint in *Sacks v. Johns-Manville Corp et al.*, No. 81-436-N (E.D. Va., filed May 15, 1981).

free of defects and that the Government would enforce safety standards. The Government also was said to have a duty to disclose knowledge that shipyard workers were being exposed to dangerous concentrations of asbestos dust. The complaint contained claims for reformation to conform the contract to the parties' agreement to indemnify Johns-Manville for third-party liabilities and for reformation based on mutual mistake, for equitable adjustment because of increased performance costs, and for a fifth amendment taking growing out of Johns-Manville's payment of injury claims. Upon defendant's motion for judgment on the pleadings, this court dismissed all but four claims. *Johns-Manville Corp. v. United States*, No. 465-83C (Cl. Ct. Mar. 6, 1987). Outstanding are claims for breach of an implied warranty that products complying with government specifications would be free from defects and safe and for a breach of a duty to inform Johns-Manville of the Government's superior knowledge concerning the actual and potential risks of asbestos and the risk to shipyard workers' health from asbestos exposure. The reformation claim is still viable as to mutual mistake about the level of safe exposure to asbestos and health risks, and the claim for equitable adjustment also remains.

Johns-Manville Corp. et al. v. United States, No. 688-83C (Cl. Ct., filed Nov. 16, 1983), also demands indemnification for amounts paid and potentially payable by Johns-Manville to persons allegedly injured by exposure to asbestos after 1963. Here Johns-Manville makes ten claims, six of which are repetitious of breach of implied warranty, implied contract to indemnify, and reformation claims made in No. 465-83C. Making its first appearance in Claims Court actions is a claim for breach of warranty to use products safely arising from the Government's control of specifications and of the conditions in which the products were used. Johns-Manville also contends that the various breaches of warranties injured

Johns-Manville as an intended beneficiary and as a third-party beneficiary of its supply contracts. An additional implied-in-fact contract to indemnify for injuries from post-1963 exposures allegedly grew out of the Government's initial requirement of contract compliance and its continued control over the asbestos products from the time of contract until 1964.

Johns-Manville Corp. et al. v. United States, No. 1-84C (Cl. Ct., filed Jan. 3, 1984), seeks recovery for amounts paid in satisfaction of claims brought against Johns-Manville for asbestos-related injuries where the claimants' exposure was not restricted to a particular time period. Eight of the nine claims in this suit were contained in No. 465-83C. The new claim is a variation on a theme. Johns-Manville alleges that the implied contract to indemnify arising from mandatory compliance with supply contracts is extended to exposure during later "rip-out" operations also under exclusive control of the Government.

Four months after filing its third suit in the Claims Court, Johns-Manville brought two additional actions against the United States for recovery of damages incurred in suits filed by Hessuph W. Sexton, alleging exposure from 1944 to 1975, *Johns-Manville Corp. v. United States*, No. 84-C-893 (D. Colo., filed Apr. 24, 1984), and by Philsun Owen, alleging exposure from 1941 to 1945 and 1951 to 1959, *Johns-Manville Corp. v. United States*, No. 84-C-894 (D. Colo., filed Apr. 24, 1984). These suits, referred to as the "Sexton" and "Owen" cases, originally were filed in the District of Colorado, but were transferred to the Central District of Califonia, becoming, respectively, Nos. CV-86-5338-PAR(B) and CV-86-5337-TJH(K). The Sexton and Owens cases, filed under the Federal Tort Claims Act, allege essentially the same bases for relief as in the Robinson case.

2. *Facts pleaded in actions brought by Johns-Manville*

When initially filed on December 7, 1981, the claims in the Robinson case were based on allegations that the Government knew of the harm of exposure to asbestos, required its use in products purchased from Johns-Manville, solely controlled the products by requiring compliance with its written specifications, and controlled the use of the products through operating shipyards and setting standards for safe levels of exposure to asbestos. Mr. Robinson suffered injuries allegedly from exposure to asbestos products manufactured by Johns-Manville during his employment in Navy shipyards from 1965 to 1976. In October 1981 Johns-Manville settled Mr. Robinson's personal injury suit for $45,000. In the second amended complaint filed on October 3, 1985, Johns-Manville reiterated its allegations as to safety standards, adding that they were not enforced, and repeated the allegations of government control of shipyards, adding that access to the yards was restricted. Johns-Manville also added allegations that it was compelled to enter contracts for the supply of asbestos-containing products; that the Government knew of the health risks caused by the lack of enforcement of safety standards; that the Johns-Manville initiated worker education programs in 1964 when it became aware of the health risks of exposure; that the Government knew or should have known of Johns-Manville's potential liability caused by government actions in shipyards; and that Mr. Robinson, in fact, was exposed to excessive concentrations of asbestos supplied by Johns-Manville.

The three suits brought by Johns-Manville in the Claims Court grow out of a similar factual nexus since they allege that compliance with contracts to supply asbestos was mandated by the Government; that the Government established, but knowingly failed to enforce, safety standards; and that the Government had exclusive

control of shipyard working conditions and limited access to, or distorted information about, those conditions.[3] In Nos. 688-83C and 1-84C, there are allegations similar to those made in the Robinson case that Johns-Manville discovered the risk of asbestos exposure in 1964 and then took measures to educate asbestos workers.

The allegations of the third-party suits, as exemplified in Johns-Manville's model third-party complaint, and the three Johns-Manville Claims Court suits overlap as to control of shipyards by the Government, the promulgation by the Government of safety standards and procedures in those shipyards, and the failure to enforce those standards. Facts unique to the third-party claims are that the individual plaintiff in each case performed work under conditions and standards controlled by the Government and that the Government knew that proper performance of the sales contracts would benefit the Government.

The three Claims Court cases and the Sexton and Owen cases have the following factual allegations in common: 1) Johns-Manville manufactured asbestos-containing products in accordance with government-established specifications; 2) such manufacture and provision to the Government was mandated; 3) the Government participated in asbestos trade, stockpiling, and allocation; 4) the Government recognized the health hazards of overexposure to asbestos, established standards of safe exposure, and failed to enforce those standards; 5) the Government did not inform Johns-Manville of the risks

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[3] The working conditions of concern in No. 688-83C, of course, were those after 1963; in No. 465-83C the conditions were those during World War II; and in No. 1-84C the conditions of interest are not time-restricted.

See Appendix B to Def's Br. filed Mar. 11, 1987, for an extensive tabular presentation of the similarities in the factual bases of the claims made in the three Claims Court cases and the second amended complaint in the Robinson case.

created by that failure; and 6) the Government exercised exclusive control of shipyards.[4]

DISCUSSION

28 U.S.C. § 1500, in its current form, prohibits this court from acting on

> any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of the action alleges such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Section 1500 was enacted over a century ago to aid the maintenance of suits against the United States after a claimant failed to receive satisfaction from suing a cabinet officer. At that time there was no *res judicata* effect to such a judgment in a subsequent suit against the United States. *See Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 576-77 (1967) [hereinafter "Schwartz"].[5] In that context section 1500 properly has been viewed as an anachronism. *See A.C. Seaman,*

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[4] Defendant also compared the facts alleged in the three Claims Court cases with the complaints in Sexton and Owen in Appendix C to its reply brief. *See supra* note 3.

[5] The statute as originally enacted, Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77, did not implement its stated purpose to give res judicata effect to judgments following unsuccessful lawsuits against officers or agents of the United States in later-filed suits in the Court of Claims. The statutory language applied only to actions "pending" in other courts. Thus, if a claimant sued a government officer or agent and the action was dismissed, the statute did not bar the subsequent prosecution of the same claim against the United States, because no duplicate claim against an officer or agent was then "pending." *See* Schwartz at 579.

Inc. v. United States, 5 Cl. Ct. 386, 389 (1984) (discussing section 1500 cases decided by the Court of Claims at 390). However, the original formulation of section 1500 that applied to pending actions against individuals was superseded in 1948. Since that date, it has not only reached suits against officers or agents of the United States, but also suits against the United States itself. The Court of Claims described this change as a "substantive change in the statute." *Tecon Eng'rs, Inc. v. United States*, 170 Ct. Cl. 389, 399, 343 F.2d 943, 949 (1965), *cert. denied*, 382 U.S. 976 (1966).

The Supreme Court had occasion to construe the earlier version of the statute that applied only to suits maintained against officers and agents of the United States. In *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), plaintiff sued for a balance allegedly due under a contract for delivery of coal. The cognizant agency set a general price for coal higher than the contract price and the action had sought the difference. The Court of Claims dismissed the action because under applicable statute the case properly belonged in district court. Before the direct appeal to the Supreme Court, plaintiff filed suits in federal district courts against a government officer asserting the same cause of action as in the Court of Claims case. The Government moved to dismiss the appeal based on an early version of section 1500, which then prevented either the Supreme Court or the Court of Claims from proceeding on

> any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authorization of the United States.

Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1087, 1138.

Plaintiff argued before the Supreme Court, as Johns-Manville argues here, that the actions were filed out of necessity because they were about to become barred by expiration of the statutory period of limitations. In ruling that the predecessor to section 1500 barred the Supreme Court from exercising jurisdiction over an appeal of a Court of Claims decision where the same claim is pending in district courts, the Court stated unequivocally:

> But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove an apparent hardship in particular cases.

263 U.S. at 540 (citations omitted).

The Supreme Court revisited old section 1500 in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932). The Court of Claims had dismissed a suit on the ground that petitioner had instituted suits against the United States on the same claim in district court after having commenced its action in the Court of Claims. The Supreme Court noted that the Government on appeal did not contend that the Court of Claims' jurisdiction was ousted by the pendency of the suits filed in district court. The Supreme Court remarked:

> Although . . . [the suits] were not within the language of the section, they were nevertheless regarded as within its assumed purpose to prevent the prosecution at the same time of two suits against the Government for the same cause of action. But the declared purpose of the section . . . was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in a suit pending in the Court of Claims . . . . *As the words of the section are plain, we are not at liberty to add to or alter*

> *them to effect a purpose which does not appear on its face or from its legislative history. Corona Coal Co. v. United States*, 263 U.S. 537, 540.

284 U.S. at 355-56 (emphasis added; citations omitted). The import of this language was to condemn broadening the application of such a harsh statute based on the perception of its assumed purpose, as opposed to applying it strictly as drafted. However, in 1948 suits against the United States itself, as well as its offices or agents, were embraced within the limitation to the Court of Claims' jurisdiction. This amendment made the assumed purpose for the continued viability of old section 1500 its explicit language. The effect of this amendment is that *Corona Coal Co.* does not have diminished effect when asserted in an action involving a suit filed against the United States in another court after the same claim has been filed in this court. Undiminished, the effect of *Corona Coal Co.* is that the statute bars exercise of this court's jurisdiction when suit on the same claim is pending against the United States in another court.

Tecon Engineers held differently. The recalcitrant plaintiff in that case launched a last-ditch effort to avoid trial in the Court of Claims by filing an action against the United States in federal district court, then moving to dismiss without prejudice its claim in the Court of Claims. The court construed section 1500 to require dismissal of the Court of Claims action only if the same claim had been filed in another court before the Court of Claims action was commenced. The court distinguished *Corona Coal Co.* as a case involving the appellate jurisdiction of the Supreme Court and observed, "[T]here is no indication that the issue of priority was ever fully briefed, considered or decided. . . ." 170 Cl. Ct. at 401 & nn. 6-7, 343 F.2d at 950 & nn. 6-7 (noting particularly the *Corona* briefs in the Supreme Court). However, although later-filed suits were not within the reach of section 1500, according to *Tecon Engineers*, the court sug-

gested that suits filed simultaneously with Court of Claims actions were subject to the section 1500 election. *See Tecon Engineers*, 170 Ct. Cl. at 400-01 & n.4, 343 F.2d at 950 & n.4 (citing *Hobbs v. United States*, 168 Ct. Cl. 646 (1946) (suit filed one day later in district court barred jurisdiction on earlier-filed Court of Claims suit)).

The narrow holding of *Tecon Engineers* is that section 1500 cannot be used tactically by a party invoking this court's jurisdiction to prevent the court from acting on its claim. Johns-Manville does not attempt to utilize section 1500 for tactical advantage; in fact, its stated commitment is to try its case in this court. Defendant, instead, invokes section 1500 as a shield from the onus of defending against the same claims for the same relief at the same time in different courts. This is the purpose of section 1500. *See Wessel, Duval & Co. v. United States*, 129 Ct. Cl. 464, 465, 124 F. Supp. 636, 437-38 (1954); *Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314, 98 F. Supp. 579, 580 (1951).

1. *Claims filed before suit commenced in Claims Court*

Whether *Tecon Engineers* was overbroad, any infirmity lies only in its holding concerning suits filed after an action has been commenced in the Claims Court. *Tecon Engineers* and the other case law on section 1500 establish that an earlier-filed suit deprives the Claims Court of jurisdiction over an action on the same claim filed later in the Claims Court. Here, *Johns-Manville Sales Corp. v. United States*, No. C-81-4561 FEP, was filed in the Northern District of Califonia in 1981, and Johns-Manville's cases No. 465-83C, 688-83C, and 1-84C were filed in the Claims Court during 1983 and 1984.

Johns-Manville makes a forceful argument that the claims pending against the United States in the Robinson case are not duplicative of any claims scheduled for trial in No. 465-83C. Johns-Manville technically is cor-

rect. The claim for indemnity in the Robinson case is specific to facts surrounding Johns-Manville's ultimate satisfaction by settlement of a potential liability to shipyard worker Mr. Robinson, whereas liabilities incurred on the basis of other named test claimants will be tried in the Claims Court World War II cases. Johns-Manville contends, further, that by its pleadings in *Eagle-Picher Industries, Inc.*, No. 170-83C, defendant manifested general assent with Johns-Manville's position, because defendant argued on its motion in the nature of a motion for more definite statement that without more particulars as to the identity of the claims and the amount of their settlements and judgment, defendant was not in a position to judge whether section 1500 would be applicable.

In its present motion, defendant takes a more generous view of what constitutes a claim, arguing that a different theory of relief (contract versus tort) does not create a different claim or cause of action for purposes of section 1500 as long as the operative facts and the type of relief sought are the same. In *Dwyer v. United States*, 7 Cl. Ct. 565 (1985), this court held that section 1500 forces a claimant to elect between a contract and tort action if both can be said to be based on the same underlying facts. This holding was based on *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1939) (per curiam), *cert. denied*, 310 U.S. 627 (1940) (operative facts setting up liability in both tort and contract constitute same claims although theory of relief different); *National Cored Forgings Co. v. United States*, 132 Ct. Cl. 11, 19-20, 133 F. Supp. 454, 959 (1955) (plaintiff is not divested of necessity of electing between forums by bringing same claim in Court of Claims against the United States and in district court against a government corporation acting within its statutory authority); and *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. 648, 652, 152 F. Supp. 236, 238 (1957) (claim based on an account stated in Court of Claims and tax refund

claim in district court are the same claim since both seek refund of overpaid taxes). These cases stand for the proposition that a claim or cause of action is not equated to a theory of relief. Consequently, a suit in tort or contract can be the same claim or cause of action irrespective of the theory of relief urged in contract or tort, as long as it arises with respect to the same operative facts and asks for monetary relief. The discussion in *Dwyer* follows:

> The statute employs the terms claim and cause of action synonymously. ("The . . . Claims Court shall not have jurisdiction *of any claim* [in which there is pending a suit against the Government or a person] who, at the time when the cause of action . . . arose [was acting under authority of the United States].") The term "cause of action" was equated to "claim" in *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939) (per curiam), *cert. denied*, 310 U.S. 627, 60 S. Ct. 974, 84 L.Ed. 1498 (1940), upholding section 1500's bar when plaintiff brought a contract claim in the Court of Claims after suing unsuccessfully on a tort claim in district court:
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> > A recital of the operative facts relied upon by a claimant does not state two separate and distinct causes of action merely because such facts may set up a liability both in tort and contract. The terms "conversion" used in the suit in the District Court and "taking of property without just compensation" in the suit in this court were obviously used by plaintiff for the purpose of attempting to adapt the single claim to the jurisdiction of the different courts in which the claim was being urged, but the use of these terms does not obscure the unity or sameness of the claim. We think it is clear that the word "claim," as used in section 154, *supra*, has no reference to the legal theory upon which

> a claimant seeks to enforce his demand if it appears, as it does here, that the defendant in a suit in another court was, in respect of the subject matter or property in respect of which the claim was made, acting mediately or immediately upon the authority of the United States. The terms of section 154 refer to a claim "for or in respect of which" another suit is pending. . . .

89 Ct. Cl. at 440. The import of *British American* is that a suit in tort and contract can be the same claim or cause of action, irrespective of the theory of relief urged, if it arises with respect to the same operative facts, even if the contract claim, because of its value, could not have been maintained in district court.

National Cored Forgings Co., Inc. v. United States, 132 Ct. Cl. 11, 19-20, 132 F. Supp. 454, 459 (1955), again construed section 1500 as disallowing a suit when the "same cause of action or claim" is pending in district court. In *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. 648, 152 F. Supp. 236 (1957), a tax case, the Court of Claims dismissed a claim for an account stated in a different amount than suits covering the same tax years brought in two federal district courts on the theory of overpayment. "The *claim* involved is . . . before both courts. The theory advanced to sustain the *claim* is quite another matter and not determinative of the jurisdiction of this court." 138 Ct. Cl. at 652, 152 F. Supp. at 238. Nevertheless, the court remarked:

> The plaintiff could have pursued its claim on the theory of account stated alternatively to its other theories of recovery in the District Court or in the Court of Claims. Either course of action was available to plaintiff. It made its choice

> of the tribunal desired, the District Court, and therefore cannot now be heard in this court.
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> *Id.*, 152 F. Supp. at 238. Because *Los Angeles Shipbuilding* was a tax case, no monetary jurisdictional bar would have prevented plaintiff from bringing a two-count complaint in district court in the first place. Under *British American*, however, maintenance of a suit in the Claims Court would not depend on whether the claim or cause of action could be heard in district court.

7 Cl. Ct. at 568-69 (emphasis in original). *But see Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976) (section 1500 motion denied when district court action including count for tortious interference with performance for breach of contract pending, although same facts pleaded in action for breach of contract in Court of Claims).

One need look no further than *Corona Coal Co.* for corroboration of the view that a homogeneity of operative facts renders claims the same for purposes of section 1500. The Supreme Court characterized causes of action as the same because they arose out of the President's use and operation of certain railroads. Appellant had contracted with railroads for the supply of coal; thereafter these railroads came under government control, and the Railroad Administration claimed the right to enforce the contracts. When the right was denied, the Fuel Administration requisitioned the coal without prejudice to appellant to claim against the Railroad Administration or the railroad companies. The Supreme Court in *Corona Coal Co.* described both the case in the Claims Court seeking the balance due under the contracts and the subsequent actions against the President's Agent under the 1920 Transportation Act as arising out of "the possession, use and operation by the President of the railroads in question . . . [coming] within the provisions . . . [of the Transportation Act]". 263 U.S. at 539.

The Robinson case involves, *inter alia*, a theory of relief based on a special relationship between Johns-Manville and the Government. This special relationship, in turn is based on, *inter alia*, government-promulgated specifications and the Government's superior knowledge in connection with Johns-Manville's performance of contracts with the Government for asbestos-containing products during World War II. The operative facts in No. 465-83C overlap those in the Robinson case, except that the Robinson case involves sales by Johns-Manville beyond the World War II years, and Mr. Robinson was exposed to asbestos-containing products only in the 1960's. The Claims Court World War II case seeks indemnification only for exposures that occurred during the war years. Johns-Manville alleges, however, that the asbestos-containing products to which Mr. Robinson was exposed were installed during World War II. It matters not that Johns-Manville must sponsor individual indemnity claims in both actions in order to recover damages indemnifying it for specific judgments and settlements. The same operative facts during World War II precipitating the diseases or deaths for which Johns-Manville has been held liable or settled in Claims Court No. 465-83C overlap the facts alleged in the Robinson case as the basis for the special relationship with Johns-Manville whereby the Government assumed responsibility for the asbestos-containing products that Mr. Robinson removed in the 1960's. Parallel to the description in *Corona Coal Co.*, both cases involve claims arising out of the Government's specifications for asbestos-containing products and the Government's unique knowledge of the dangers or risks of exposure to asbestos, including government knowledge of its enforcement of its safety standards in shipyards. *See Johns-Manville Corp. v. United States*, No. 465-83C, slip op. at 35-37, 41 (Cl. Ct. Mar. 6, 1987). Overlapping operative facts support claims or causes of action that can sound in tort, as well as contract. The theories of relief differ, but the claims are the same.

28 U.S.C. § 1500 thus reaches different theories of relief if the facts underlying the claims are the same and the same type of relief, *i.e.*, monetary, is sought. For example, in the Robinson case Johns-Manville has made so-called "vessel-owner" claims against the United States. These arise under the Federal Tort Claims Act and are based on the Government's duties as vessel owner to maintain its ships in safe condition; to avoid exposing persons aboard to unsafe conditions within the vessel owner's control; and to warn persons aboard about hidden hazards. These duties do not arise out of the contractual relationships at issue in the Claims Court litigation; but the facts that may spell their breach are the same facts alleged as a basis for the breaches pleaded in Johns-Manville's Claims Court complaints.

Johns-Manville argues that if all the averments (operative facts) in the Robinson case dealing with the World War II years that duplicate Claims Court No. 465-83C were excised, a viable cause of action would remain. Johns-Manville refers to the facts dealing with the relationship of Johns-Manville and the Government after World War II. However, Claims Court No. 688-83C picks up that refrain, and Claims Court No. 1-84C makes the same factual allegations respecting the Johns-Manville-Government relationship that may account for exposures occurring other than exclusively during World War II years that duplicate Claims Court No. 465-83C except that the Claims Court litigation was filed as three cases and Mr. Robinson is one claimant who was exposed to asbestos only in the 1960's.

It is also asserted that the Robinson case presents later-filed claims in that the original complaint was dismissed as to all claims other than a taking claim as of the date Johns-Manville filed No. 465-83C in the Claims Court. The facts pleaded in the original complaint are pleaded separately from the recitation of claims. Johns-Manville's argument is typically well-crafted, but it would eviscerate the doctrine of relation back of claims to hold that

claims set up in an amended complaint do not relate back to the date the original complaint was filed. Johns-Manville argues further that the Federal Tort claims were dismissed as legal non-entities for failure to file administrative claims. Once the claims were denied, Johns-Manville had two years to sue under the Federal Tort Claims Act. This is true, but instead of commencing a new Robinson suit, the counts were added back into the 1981 action, and the operative facts pleaded in 1981 and in the perfected counts were much the same. As defendant points out, Johns-Manville's Torts Claims Act claims were not ripe insofar as legal theories in 1981, but the facts giving rise to the claims existed and were pleaded in a pending complaint.

According to Johns-Manville, the Robinson case was structured precisely to avoid presenting same claims as the later three Claims Court cases. It is true that Mr. Robinson is not an underlying claimant in any of the three Claims Court suits.[6] This argument confuses the concept of operative facts with secondary facts, if a term may be coined. Johns-Manville could not sue for indemnification absent one or more identified individuals to whom money has been paid by way of settlement or judgment. The cause of action for indemnification only arises when such a claim has been paid. *See, e.g., Garza v. Arizona Ref. Co.*, 634 F. Supp. 959, 962 (S.D. Tex. 1986); *s.a.r.l Orliae v. Winebow, Inc.*, 595 F. Supp. 470, 473 (S.D.N.Y. 1984). Damages are claimed based on the judgments, reasonable costs of settlement, and reasonable expenses.[7] But this does not mean that each claimant sets up unique operative facts in respect to the 1) relationship of Johns-Manville and the Government and 2)

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[6] Johns-Manville says that Mr. Robinson was inadvertently listed as an underlying claimant in No. 1-84C, and the court accepts the representation.

[7] The Claims Court litigation involves many claims that yet have not been settled or reduced to judgment.

the conduct of the principals leading up to and involved in the claimant's exposure and injuries. That the shipyards, contracts, and claimants differ is not significant, as shown by the fact that the World War II cases are being tried on the basis of test claimants and shipyards. The solid weight of facts to be proved at trial of No. 465-83C, according to the parties' proposed findings, is covered by these two general descriptions. The claimant-specific facts are few and incidental. Even though in any subsequent damages trial claimant-specific facts may have more import, they do not constitute the gravity of facts required to present Johns-Manville's claims for government liability.

In *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. 648, 152 F. Supp. 236, defendant moved for judgment on the pleadings in part for lack of jurisdiction of subject matter under 28 U.S.C. § 1500. Plaintiff was claiming entitlement to a return of overpayments of taxes for years 1940-1941 and 1943 based on the theory of an account stated growing out of an initial agreement between plaintiff and the IRS as to the amount of the overpayment and the means by which plaintiff would be credited for that amount, which the IRS later repudiated. At the time the Court of Claims was considering this motion, plaintiff had two suits pending in federal district court, one suit against the United States and the other against the District Director of Internal Revenue Service based on theories of overpayment of taxes and wrongful refusal to refund overpayments made in 1940, 1942, 1943, and 1946, respectively. The Court of Claims determined that the amount of tax overpayment sought in that court was "entirely included within the plaintiff's claims in one or both of the suits in the District Court." 138 Ct. Cl. at 651, 152 F. Supp. at 237. Although, as plaintiff pointed out, proofs in the Court of Claims action would differ from those in district court because of differences in years covered and in theories, the Court of Claims dismissed

the action since, at bottom, both suits concerned whether plaintiff had overpaid taxes, and the years at issue in the Court of Claims action were included within the district court actions. Thus, since the matters at issue in the Court of Claims were subsumed within the district court actions, the court determined that plaintiff had elected to proceed in district court and would not hear the case.

What Johns-Manville seeks to obtain in the Robinson case is, of course, a victory, but more importantly, a basis to collaterally estop the Government on the operative facts in subsequent litigation. The Claims Court cases are test cases. Johns-Manville will be bound by the findings on liability in respect to the so-called test claimants for all of its actual and potential claims arising out of World War II exposure, although the complaint refers to only 56 suits that had been settled and 327 suits pending at the time the case was filed. Johns-Manville receives substantial benefits by proceeding with test cases. For example, it need not prove that contingency reserves or insurance premiums were considered a cost of performance for every contract with the Government during the World War II years for the supply of asbestos-containing products to all the shipyards wherein the underlying claimants worked. Rather, Johns-Manville can attempt to prove by a preponderance of evidence that the Government adopted a self-insurance policy in its overall contractual relationship with Johns-Manville. By culling the Robinson case out of the Claims Court litigation, Johns-Manville seeks an opportunity to try as a tort the same operative facts that are before the Claims Court in at least Nos. 465-83C (over 300 claims) and 688-83C (over 1,200 claims). If section 1500 could not reach this situation, the result would be that in any multiple-claimant situation, the Government would always be put to duplicate defense in the Claims Court and in other courts. If section 1500 has any utility, it should be to force election between this court and others for massive litiga-

tion like the instant asbestos cases that can only be handled on a test-case basis.

Section 1500 applies, as well, to Johns-Manville's previously filed third-party actions. The third-party actions plead the same operative facts underlying both the Government's specifications and knowledge of shipyard conditions and the Government's alleged duties to exercise care, supervise, and warn concerning the use of asbestos-containing products in shipyards.[8]

This court ruled in *Dwyer v. United States*, 7 Cl. Ct. 565, that the issue on a motion under section 1500 is whether the Claims Court is deprived of jurisdiction of an action when the same claim asking for the same relief is pending in another court, not whether a stay of an action coming within the jurisdiction of the Claims Court is appropriate. 7 Cl. Ct. at 567 (citing *National Bank of Detroit v. United States*, 1 Cl. Ct. 712 (1983) (order denying motion for stay of proceedings)). Other decisions have taken a different view, *see, e.g., Prillman v. United States*, 220 Ct. Cl. 677, 679 (1979); *Arizona Helicopters, Inc. v. United States*, 4 Cl. Ct. 662, 666 (1984), but no jurist contends that the statutory language calls for less than dismissal.

As originally enacted, however, section 1500 contained a proviso to mitigate the hardship of requiring a party

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[8] Johns-Manville argues with respect to third-party suits filed both before and after commencement of its Claims Court action that section 1500 should apply only to direct suits because its third-party suits are not voluntary. This argument is rejected based on *Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 98 F. Supp. 579, wherein it was decided that plaintiff's previously filed counterclaim in district court precluded a later suit in the Court of Claims on the same claim against the United States. A third-party complaint lacks voluntariness in much the same way as a counterclaim. A counterclaim must be pleaded in any appropriate action. Although a third-party plaintiff is not mandated to sue the third party, and a direct action can accomplish the same result, third-party practice is encouraged to avoid piecemeal litigation.

to abandon litigation pending in other courts. The Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77, barred prosecution of a claim in the Court of Claims unless the pending claim "if now pending in such other court, shall be withdrawn or dismissed wihin thirty days after the passage of this act." There is no reason why the same election should not be extended Johns-Manville, given the exquisitely poor timing of defendant's motion less than two months before a six-week trial was to commence. Accordingly, Johns-Manville will be given 60 days to start the process or obtain dismissal of the Robinson case and its third-party cases. *See Brown v. United States*, 175 Ct. Cl. 343, 358 F.2d 1002 (1966) (vacating earlier dismissal based on section 1500 and exercising jurisdiction under claim since offending claim had been dismissed by the district court and time for appeal had run).[9]

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[9] The additional arguments made by plaintiffs other than Johns-Manville have not been addressed, except regarding the effort to give law of the case effect to the 1981 *Keene* and 1983 *Eagle-Picher* orders and regarding an argument particularized by Eagle-Picher concerning vessel owner claims. One argument made principally by GAF Corporation ("GAF") is noted because it has a first-blush appeal. GAF marshals numerous statutes, *e.g.*, 28 U.S.C. § 1331(a) (1982), governing diversity jurisdiction, for the proposition that once jurisdiction attaches subsequent acts of the parties cannot divest it. Thus, withdrawal of a party does not defeat diversity. From this GAF argues that on the date it filed in the Claims Court no other claim on the same operative facts was pending against the United States and that, therefore, jurisdiction attached on the date its contract actions was filed and cannot be defeated by its filing, one day later, a tort action based on the same operative facts.

28 U.S.C. § 1331(a), and most of the other statutes cited by GAF, determines the court in wihch an action is to proceed. Section 1500 prohibits the maintenance of an action in the Claims Court if an action on the same operative facts is pending elsewhere. The purposes of these statutes differ. More fundamentally, GAF's argument invites the manipulative tactics condemned in *Tecon Engineers*. Under GAF's reasoning, a party could file an action in district court, then another action in the Claims Court, then amend its district court complaint to add a count pleading facts and a tort theory of

2. *Claims filed after suit commenced in Claims Court*

Johns-Manville filed the Sexton and Owen cases after filing its three Claims Court cases. The application of section 1500 to bar jurisdiction over Claims Court suits on the same claims as have been asserted in later-filed, pending suits in other courts begins with an analysis of its statutory language. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (citation omitted). The Federal Circuit has followed the Supreme Court's direction in *Caminetti v. United States*, 242 U.S. 470, 485 (1917), that if " 'the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.' " *Lehman v. Don Jones & Co., Inc.*, 783 F.2d 285, 292 (Fed. Cir. 1986) (citation omitted).

The unambiguous language of section 1500 calls for a literal interpretation: Jurisdiction of the Claims Court is foreclosed over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit . . . against the United States." Section 1500 divests this court of jurisdiction whenever another suit has been brought on the same claim—irrespective of whether the second suit is filed before or after the Claims Court action. As long as the second suit is pending, the Claims Court must relinquish jurisdiction. The meaning is rational because Congress reasonably could have acted to avoid taxing the fisc with the costs of defending against the same claim in multiple courts. Moreover, Congress reasonably could have assured by statute that

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relief that otherwise duplicated the Claims Court claim and not run afoul of 28 U.S.C. § 1500. For these reasons GAF's argument is rejected.

the role of comity be obligatory whenever suits on the same claim were pending in the Claims Court and other courts. What Congress obtained by the language of section 1500 was to make certain that a claimant could not avail itself of the Claims Court, the court empowered to hear most contract claims against the United States, if it sued on the same claim in another court. Since the rule of comity does not guarantee forbearance,[10] Con-

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[10] The comity doctrine is an equitable doctrine used by federal courts to avoid duplicative litigation where the same parties and issues are before two or more courts with concurrent jurisdiction. *See Great Northern Ry. v. National RR. Adjustment Bd.*, 422 F.2d 1187 (7th Cir. 1970). Normally the "first filed" complaint will be allowed to proceed, while the second court will stay its hand. However, the Supreme Court in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952), held that the "first filed" rule was not one of rigid construction and approved dismissal of a complaint which first acquired jurisdiction where the second litigation would best resolve all the issues:

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. . . .

342 U.S. at 183-84.

The Ninth Circuit addressed the comity doctrine in the context of federal docket overcrowding in *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979), noting that "increasing calendar congestion in the federal courts makes it imperative to avoid concurrent litigation in more than one forum whenever consistent with the rights of the parties." Judicial efficiency sometimes is best served by dismissal of the "first filed" action. In *Pacesetter Systems, Inc. v. Meltronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982), the court explained that "[the] 'first to file' rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *See also Orthman v. Apple River Campground, Inc.*, 765 F.2d 119 (8th Cir. 1985); *cf. Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) (absent compelling circumstances, the court initially seized of a controversy should be the one to decide it).

gress sought by section 1500's language to prevent suits on the same claims, although the theories of relief themselves might not be the same.

Slavish adherence to plain meaning "on a purely linguistic level" is not required if the interpretation of unambiguous language "does not do justice to the realities of the situation." *Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 406 (Fed. Cir. 1986), *cert. denied*, 107 S.Ct. 874 (1987). The Federal Circuit quoted *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), for the "'familiar rule that a thing may be within the letter of the statute, but not within its spirit nor within the intention of its makers.'" 796 F.2d at *id.*; *see also Institut Pasteur v. United States*, No. 86-1541, slip. op. at 6 (Fed. Cir. Mar. 9, 1987). *But see Texas State Comm'n*, 796 F.2d at 417 (dissenting op.). Judge Archer in *Reid v. Department of Commerce*, 793 F.2d 277, 281-82 (Fed. Cir. 1986), said that a court should not look under the plain meaning of unambiguous language to devine the real purpose of Congress

> unless a literal interpretation would lead to an incongruous result. For example, if a literal reading of the statute would impute to Congress an irrational purpose, *United States v. Bryan*, 339 U.S. 323, 338, 70 S.Ct. 724, 734, 94 L.Ed. 884 (1950), or would thwart the obvious purpose of the statute, *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978), or would lead to a result at variance with the policy of the legislation as a whole, *Trustee of Indiana University v. United States*, 618 F.2d 736, 739, 233 Ct. Cl. 88, 94 (1980), then literal interpretation will be eschewed in favor of resort to the legislative history to ascertain the intent of Congress. *United States v. Oregon*, 366 U.S. at 648, 81 S.Ct. at 1281; 2A Sands § 46.07.

However, interpretation of the statute beyond its clear language to discern a statutory purpose at variance with its terms must disclose a "clearly expressed legislative intent to the contrary." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It is submitted that the legislative intent behind the current version of 28 U.S.C. § 1500 cannot be described as clear or clearly expressed. Rather, it is inferential, and the stronger inference is consistent with judicial deference to the unambiguous language of the statute.

Unquestionably, Congress enacted section 1500 to insulate the United States from suits filed by claimants who had been unsuccessful in actions against officers or agents of the United States. The Court of Claims in *Tecon Engineers* made a careful textual analysis of statutory language and legislative history, concluding that the vice Congress guarded against was previously filed lawsuits, not actions commenced after jurisdiction of the Court of Claims attached. *See* 170 Ct. Cl. at 399-400, 343 F.2d at 949. In reaching its conclusion, the court pointed to changes in statutory language that excised language from the original statute. In 1868 the statute disallowed prosecution of suits in the Court of Claims if the claimant "shall have commenced and has pending any suit . . . in any other court" in respect of the same claim. In 1874 the words "shall have commenced and" were deleted, so that the statute read, as it does now, "has pending in any other court any suit." *See id.* at 397, 343 F.2d at 948. The Court of Claims quoted legislative history to the effect that this revision did not attempt to change the law. *See id.* at 398, 343 F.2d at 348-49.

What occurred next was a "substantive change," as so described by the Court of Claims, *id.* at 399, 343 F.2d at 349, when in 1948 Congress added the United States as a party defendant.[11] However, the legislative history

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[11] In the 1948 amendment, Congress also deleted the phrase "or in the Supreme Court on appeal therefrom," indicating that the

once again again characterized the change as a "change in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A 140 (1947), *reprinted in* 28 U.S. Code Cong. Serv., 30th Cong., 2d Sess. 1862 (1948) [hereinafter "House Report"]. A court has three choices at this juncture. One is to read the new language consistently with the original statutory purpose; the second is to investigate further to see what the change means in view of developments since the statute was enacted; the third is to read the unambiguous language without further interpretation.

The Court of Claims in *Tecon Engineers* took the first approach. It reasoned that since the original purpose of old section 1500 was to give res judicata effect to lawsuits against government officers and agents in actions against the United States filed after the suits had been lost, the addition of the United States did "not change the legal effect" of the statute on the question of whether section 1500 applied to suits filed in other courts after an action on the same claim had been initiated in the Court of Claims. 170 Ct. Cl. at 399, 343 F.2d at 349.

This court respectfully offers the view that the second or third approach would have yielded a more appropriate result. *See* Schwartz, 55 Geo. L. Rev. at 573-74. The Supreme Court in *Corona Coal* in 1924 had dismissed an appeal against the United States because suits had been filed against a government agent after a Court of Claims decision on the same claims. Some years later in *Matson Navigation* the Court of Claims dismissed a peti-

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language was "unnecessary." House Report at A 140, *reprinted in* 1948 U.S. Code Cong. Serv. 1862. The effect of the change was to eliminate the section 1500 limitation on Supreme Court proceedings, so that, if an action was filed in district court after the Court of Claims dismissed the same claim, the Supreme Court could entertain an appeal of the Court of Claims decision. That the Supreme Court's decision in *Corona Coal* was premised on this now defunct language does not detract from its viability, as the identical language construed by the Court applied to the Court of Claims at that time and still does.

tion after a suit on the same claim had been filed against the United States (not a goverment officer or agent) in district court. The addition of the United States as a party defendant by the 1948 amendment can be viewed as a response by Congress consistent with the Supreme Court's criticism in *Matson Navigation* of the Court of Claims' dismissal because the "assumed purpose" (not the stated purpose) of old section 1500 was "to prevent the prosecution at the same time of two suits against the Government for the same cause of action." 284 U.S. at 355. The scant legislative history of the 1948 amendments gives no indication of the purpose of the addition of "the United States," stating only that "[c]hanges were made in phraseology." House Report at A 140, *reprinted in* 1948 U.S. Code Cong. Serv. 1862. *Schwartz*, however, sees more significance in the change. "The revisers seem plainly to have intended to overrule . . ." Matson, *Schwartz* at 580, so that the "assumed purpose" became the actual effect.

It is as plausible that Congress added the United States as a party defendant to rectify the *Matson Navigation* criticism as it is plausible that the added language —what the Court of Claims referred to as the "substantive change"—was surplusage. Moreover, before the issuance of its opinion in *Tecon Engineers*, the Court of Claims at least twice took the position that the purpose of the statute was, consistent with the "assumed purpose" of *Matson Navigation*, to avoid duplicative litigation in the same court at the same time. *Wessel, Duval & Co. v. United States*, 129 Ct. Cl. at 465-66, 124 F. Supp. at 637-38; *Frantz Equip. Co. v. United States*, 120 Ct. Cl. at 314, 98 F. Supp. at 580.

In fact, the only way to give all the terms of section 1500 effect is to ascribe the *Matson Navigation* assumed purpose to be the statute's current purpose. If the original statutory purpose in 1868 is assumed valid, *i.e.*, to give res judicata effect to failed lawsuits, it makes no

sense for the statute to be revised to give res judicata effect to lawsuits against the United States in actions later filed against the Unted States. Res judicata always applied to actions in respect of the same parties. Rather, the addition of the "United States" meant simply what the language said: A claim could not proceed in the Court of Claims if it was pending elsewhere against the United States. And if this is a correct reading of section 1500, restricting its reach only to suits filed prior to Court of Claims or Claims Court suits makes no sense. Whether a suit on the same claim is filed before or after an action in the Court of Claims or Claims Court, the Government's defense of it involves duplicative effort. The wisdom of the Framers may not be imputed to congressional enactments, but a statute should not be read to yield a nonsensical legislative purpose. Finally, it should be emphasized that *Tecon Engineers* reached its holding on the basis that addition of the "United States" to the statutory language was not material. *Tecon Engineers* could not have held as it did had effect been given to the added language.

The Court of Claims could have achieved the salubrious narrow holding of *Tecon Engineers*—that a plaintiff cannot use section 1500 to manipulate the Court of Claims' jurisdiction—without ruling broadly that section 1500 applies only to an action commenced before suit on the same claim is filed in the Court of Claims. *See Universal Fiberglass Corp. v. United States*, 210 Ct. Cl. 206, 218, 537 F.2d 393, 399 (1976) (United States allowed to pursue counterclaim in Court of Claims identical to claim pending in district court because section 1500 "applies to any claim which the *plaintiff* has pending in another court" (emphasis in original)). However, because the holding of *Tecon Engineers* squarely reaches the cases at bar and because it is a published opinion of the Court of Claims, *see South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982); *Connolly v. United States*, 1 Cl.

Ct. 312, 323 (1982), *rev'd on other grounds*, 716 F.2d 882 (Fed. Cir. 1983); General Order No. 1(1), 1 Cl. Ct. XXI (1982), denial of defendant's motions is commanded with respect to the same claims sued on in other courts after Johns-Manville began process in the Claims Court. This court believes that the Federal Circuit should reconsider and modify *Tecon Engineers* to reach a result more harmonius with the language of section 1500. Congress should have taken occasion in the 20 years since Sr. Judge Schwartz wrote his provocative article to redress the problems with section 1500. That the legislature has not acted does not signify that the statute can, or should, be ignored or construed to allow judicial forbearance. The statute is on the books; it makes sense; and it accomplishes a worthwhile purpose in this area of multi-jurisdiction duplicative litigation.

Finally, even if *Tecon Engineers* were not binding authority, this court would deny defendant's motion regarding later-filed suits. If *Tecon Engineers* is no longer to be the rule, the change should be prospective. Reliance of plaintiffs in the asbestos cases on *Tecon Engineers* was not frivolous. The decision has been followed repeatedly and without question by the Court of Claims and Claims Court. Moreover, the statutory directive of section 1500 is to relieve the Government from duplicative litigation. Defendant knew as early as 1980 that it had an argument to make concerning later-filed cases that flew in the face of *Tecon Engineers*. Section 1500 is intended to conserve the Government's resources, not to punish claimants. Defendant's litigation tactics should not lose sight of the former objective.

CONCLUSION

Accordingly, based on the foregoing,

1. Defendant's motion to dismiss Nos. 465-83C, 688-83C, and 1-84C is granted on the basis of earlier-filed claims pending in district courts, and the Clerk of the

Court shall dismiss the complaints on June 5, 1987, unless by that date Johns-Manville has filed a Status Report indicating that it has obtained the dismissal, or has submitted motions for dismissal or proposed orders of dismissal, of the Robinson complaint and all third-party complaints against the United States pending in the Eastern District of Virginia. Defendant's motion is denied with respect to the Sexton and Owen cases.

2. Pursuant to 28 U.S.C. § 1292(d)(2) (1982), the court is of the view that the issues of whether 28 U.S.C. § 1500 prevents the Claims Court from exercising jurisdiction of 1) the same claims pending against the United States in the Robinson and third-party cases in the Eastern District of Virginia that were filed before Nos. 465-83C, 688-83C, and 1-84C; and 2) the same claims pending against the United States in the Sexton and Owen cases that were filed after Nos. 465-83C, 688-83C, and 1-84C, including whether *Tecon Engineers* should be reconsidered on point, present controlling questions of law with respect to which there is substantial ground for difference of opinion. An immediate appeal from this order materially will advance the ultimate termination of the asbestos litigation if the appellate court affirms the court's order and plaintiffs in other asbestos cases elect to dismiss their Claims Court litigation. Although Johns-Manville has manifested its commitment to the Claims Court litigation if this court's order is affirmed, an immediate appeal materially will advance the termination of Johns-Manville's litigation in district courts should this court's order be affirmed. This court also is of the view that a stay of the order entered by ¶ 1 pending decision of the Federal Circuit would be in the interest of justice in that Johns-Manville would be prejudiced if it dismissed with prejudice the Robinson and third-party cases in advance of obtaining appellate review.

3. Any motion to certify pursuant to ¶ 2 hereof shall not affect the pretrial and trial schedule in No. 465-83C. The Department of Justice has represented that it will not seek a writ of mandamus to prevent trial from commencing in No. 465-83C.

/s/ C. Nettesheim
CHRISTINE COOK NETTESHEIM
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Miscellaneous Docket Nos. 160 and 161

JOHNS-MANVILLE CORPORATION, *et al.*,
Plaintiffs/Cross-Petitioners,

and

GAF CORPORATION,
Intervenor.

v.

THE UNITED STATES OF AMERICA,
Defendant/Petitioner.

Filed May 6, 1987

Before DAVIS, SMITH, and NIES, *Circuit Judges.*

ORDER

The following documents have been submitted:

(1) The United States' petition for permission to appeal pursuant to 28 U.S.C. § 1292(d)(2)[1] from the

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[1] 28 U.S.C. § 1292(d)(2) provides:

When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement

April 6, 1987 interlocutory order certified for immediate appeal by the Claims Court;

(2) Johns-Manville Corporation's (Manville) petition for permission to appeal from the April 6 order;

(3) Manville's motion for stay of the April 6 order;

(4) Manville's motion to stay the briefing schedule here and the government's opposition thereto; and

(5) GAF Corporation's (GAF) petition for leave to intervene or, in the alternative, for permission to appeal and the government's response supporting amicus curiae status for GAF.

The government filed a motion to dismiss Manville's pending cases in the Claims Court on the ground that under 28 U.S.C. § 1500 [2] other suits filed by Manville in district courts preclude the Claims Court from exercising jurisdiction. The Claims Court's April 6, 1987 order granted the government's motion to dismiss holding (1) that 28 U.S.C. § 1500 would require dismissal of Manville's Claims Court actions because of previously-filed Manville actions in the Northern District of California and the Eastern District of Virginia unless Manville acted to secure dismissal of those actions within sixty days, and (2) that *Tecon Engineers, Inc. v. United*

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that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to the Court within ten days after the entry of such order.

[2] 28 U.S.C. §1500 provides in pertinent part:

The United States Claims Court shall not have jurisdiction of any claims for or in respect as to which the plaintiff . . . has pending in any other court any suit or process against the United States . . . .

States, 343 F.2d 343 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) mandated that the Manville action in the Eastern District of California, filed after the Claims Court action, could proceed along with the Claims Court actions. The government petitions from the latter issue and Manville petitions from the former issue and also from the question of whether a formal stay of all district court proceedings would satisfy the jurisdictional requirements of § 1500.

Manville also requests that, if this court grants the petitions for permission to appeal, the April 6, 1987 order granting the government's motion to dismiss within sixty days be stayed until this court has decided the jurisdictional questions certified for review.[3] Additionally, Manville requests that the briefing schedule here be stayed for approximately six weeks, or until after the completion of the trial scheduled to commence May 4, 1987 in the Claims Court.[4] Manville argues that if briefing is not stayed, Manville will be required simultaneously to try the Claims Court case and to brief the important jurisdictional questions here.

Finally, GAF petitions for leave to intervene in this proceeding. The government notes that GAF's intervention request is one day out of time. *See* Fed. R. App. P. 5(a). GAF is the plaintiff in a related action before the Claims Court. The government has an outstanding motion to dismiss under 28 U.S.C. § 1500 in the *GAF* proceeding similar to the motion granted in the *Manville* proceedings.

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[3] In its April 6 order, the Claims Court asked this court to stay the order pending review "in the interest of justice." Order at 32.

[4] In its April 6 order, the Claims court stated:

> Any motion to certify . . . shall not affect the pretrial and trial schedule in no. 465-83C. The Department of Justice has represented that it will not seek a writ of mandamus to prevent trial from commencing in no. 465-83C.

Order at 32.

Upon review of the parties' submissions and the Claims Court order, the court determines that the criteria for granting the petitions for permission to appeal have been met and that exercise of Federal Circuit discretionary jurisdiction is warranted.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' and Manville's petitions for permission to appeal are granted and are hereby consolidated.

(2) Manville's motion to stay the Claims Court's April 6, 1987 order pending resolution of the instant appeal is granted.

(3) Manville's motion to stay the briefing schedule pending completion of the trial in the Claims Court is granted. Manville's main brief and GAF's amicus brief are due thirty days after the record has closed in the Claims Court trial, No. 465-83C.

(4) GAF will be allowed to participate as amicus curiae.

FOR THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Circuit Judge

May 5, 1987
Date

cc: David S. Fishback, Esq.
Harvey G. Sherzer, Esq.
H. Michael Semler, Esq.
Paul A. Zevnick, Esq.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Miscellaneous Docket Nos. 160 and 161

JOHNS-MANVILLE CORPORATION, *et al.*,
Plaintiffs/Cross-Petitioners,

v.

THE UNITED STATES OF AMERICA,
Defendant/Petitioner.

Filed June 11, 1987

Before DAVIS, *Circuit Judge.*

ORDER

On May 5, 1987, this court granted Johns-Manville Corporation's and the United States' petitions for permission to appeal from the April 6, 1987 interlocutory order certified for immediate appeal by the Claims Court. Manville petitioned from that part of the order holding that Manville's Claims Court action must be dismissed in light of previously-filed Manville actions in district courts; the United States petitioned from that part of the order holding that Manville's Claims Court action could proceed along with district court actions filed after the Claims Court action.

Now, the United States moves to withdraw its petition for permission to appeal. Manville does not oppose the motion.

The court will grant the United States' motion to withdraw. However, it is noted that the nature and scope of the court's review is not limited to the certified question. The court is free to consider all questions material to the order. *United States v. Connally*, 716 F.2d 822, 825 (Fed. Cir. 1983); *Consolidated Express v. New York Shipping Association*, 602 F.2d 494, 502 (3d Cir. 1979).

Accordingly,

IT IS ORDERED THAT:

The motion to withdraw is granted.

FOR THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Circuit Judge

June 9, 1987
Date

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1332

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On Appeal from the United States Claims Court
in Case No(s). 465-83C, 688-83C, and 1-84C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Aug. 25, 1988

Costs: Against, Appellants.

Printing $312.80

Total $312.80

Issued as a Mandate: Sep. 15, 1988

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 81-4561 RFP

JOHNS-MANVILLE SALES CORP.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER RE MOTION TO DISMISS

Filed Aug. 21, 1985

INTRODUCTION:

Johns-Manville Sales Corp. ("J-M") filed this action against the United States on December 7, 1981, to recover equitable indemnity, in whole or in part, from the United States, in the amount Johns-Manville paid to settle a claim with John J. Robinson.[1] Robinson was a

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[1] In February of 1983, the court dismissed the first three causes of action of J-M's 1981 complaint, on the grounds that the court had no subject matter jurisdiction because J-M had failed to file for administrative relief under the Federal Tort Claims Act, 28 U.S.C. § 2675. The court retained jurisdiction over J-M's fifth amendment claim because it involved no administrative claim requirement. On January 9, 1984, the court granted J-M's request to file its first

federal employee allegedly injured by exposure to asbestos-containing products J-M manufactured while working at Long Beach and Mare Island Naval Shipyards in California. Robinson was employed in these shipyards from 1965 to 1980. J-M settled that case for $45,000 in October of 1981.

J-M asserts four claims in its first amended complaint.[2] These claims fall into two categories: 1) claims that the United States breached a duty it owed directly to Johns-Manville, and 2) a claim for partial, equitable indemnity [3] because the government, as employer and vessel owner, was negligent towards John Robinson.

The government has moved to dismiss claims one through four on the grounds that these counts fail to

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amended complaint because the court found that J-M had satisfied its duty to bring an administrative claim.

At that time, the court also rejected the government's argument that the exclusive remedy provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), barred J-M's first four claims. The court found that the 1983 Supreme Court decision in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1993), effectively answered the defendant's argument.

[2] In its first amended complaint, J-M originally included a count alleging a fifth amendment taking violation and a count asserting admiralty jurisdiction. In its response to the defendant's motion to dismiss, J-M has dropped its claims based on these two theories.

[3] Claim four of the first amended complaint originally also contained a claim for contribution. Contribution in California is a statutory right, and may only be had when a "money judgment has been rendered jointly against two or more defendants in a tort action." Cal. Code Civ. Pro. § 875. The government says that no money judgment has been rendered against J-M and the United States in Robinson's action, and therefore J-M is not entitled to contribution.

J-M has conceded the accuracy of the government's interpretation of California contribution law and drops its claim for contribution. Plaintiff's Opposition, filed 7/30/84 at 46.

state a claim upon which relief can be granted, and that this court does not have subject matter jurisdiction. For the reasons set forth below, the court denies the defendant's motion to dismiss claims one, two, and three, because J-M alleges that it was forced, under threat of civil and criminal penalties, to supply asbestos to the government. As discussed below, however, it is not clearly stated how asbestos J-M supplied during World War II caused Robinson harm. With regard to the causal element, the court treats the defendant's motion to dismiss as a motion for more definite statement and grants J-M thirty days to amend its complaint to state facts to show the causal link between defendant's behavior and Robinson's injury for counts one, two, and three.

The court also denies the defendant's motion to dismiss the fourth claim, preserving it to the extent that it rests on a theory of the defendant's liability to John Robinson as vessel owner.

LEGAL ANALYSIS:

The legal analysis in this case is complex and depends upon a careful understanding of the relationship between the doctrines of waiver of sovereign immunity and state laws providing for liability and indemnification. The court first sets forth an overview of its analysis of the welter of laws and legal principles discussed by the parties in voluminous briefs.

Johns-Manville is suing the government under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), and 2671, *et seq.* Section 1346(b) of Title 28 provides jurisdiction for federal courts over suits against the United States where the "United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Under the FTCA, the liability of the government depends on whether a private person [4] in like circumstances would be liable under the state law applicable where the act or omission occurred. *United States v. Muniz*, 372 U.S. 150, 153 (1963); *Poindexter v. United States*, 752 F.2d 1317 (9th Cir. 1983); *Wright v. United States*, 719 F.2d 1932, 1934 (9th Cir. 1983) ("The elements of a cause of action under the FTCA are determined by state law."); *Rudelson v. United States*, 602 F.2d 1326, 1332-33 (9th Cir. 1979). Thus, the court must ask whether, under the applicable state law, the plaintiff has stated

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[4] Note that this analysis makes state law regarding the liability of municipalities irrelevant to this case. The Supreme Court has said that federal law governs the scope of the federal government's immunity, therefore any state law on municipal and state government immunity does not apply to suits under the FTCA. *United States v. Muniz*, 374 U.S. 150 (1963) (FTCA allowed suit by federal prisoner who alleged negligence by federal prison officials in Indiana, even though state law may bar such suits by state prisoners).

In other words, the court must apply the state law applicable as if the federal government were a private person acting in that state. *See e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (United States could be liable for negligent operation of lighthouse. Court rejected the reading of "the statute [FTCA] as imposing liability in the same manner as if it [the government] were a municipal corporation and not as if it were a private person."); *Wright v. United States*, 719 F.2d 1032, 1043 (9th Cir. 1983) (plaintiff could sue IRS agent for malicious prosecution under the FTCA even though California law provided California government agents immunity from malicious prosecution action; court said equating the United States to that of a state municipal corporation under state law would be erroneous); *Guy v. United States*, 492 F. Supp. 571, 571-72 (N.D. Cal. 1980) (federal prisoner allowed to sue prison officer for negligence even though California state law would provide immunity for state officials on those facts). The court rejects J-M's argument that these cases govern the court's consideration of the government's liability here. *See* Plaintiff's Memorandum in Opposition, filed 7/30/84 at 25.

facts which, if the government was a private person, would support liability.[5]

J-M asserts two types of claims against the government: claims based on the government's breaches of tort duties it allegedly owed directly to J-M, and a claim for equiable indemnity. Under a rule 12(b)(6) motion, the court will not dismiss a claim unless it appears that the plaintiff can prove no facts that support a claim for relief. *Church of Scientology of California v. Flynn*, 747 F.2d 694, 696 (9th Cir. 1984). With the admonition in mind that a court should be reluctant to use rule 12(b)(6) to eliminate novel legal theories, *Sherman v. St. Barnabas Hospital*, 535 F. Supp. 564, 572 (S.D.N.Y. 1982), the court evaluates each of J-M's claims. The court starts first with J-M's claims that the government breached duties owed directly to J-M.

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[5] J-M takes conflicting positions on which state laws are applicable to the government in this case. At one point, in discussing California's conflict of interest laws, J-M argues that the government's negligent acts or omissions occurred in Washington, D.C., where governmental decision were being made. Plaintiff's Opposition, filed 7/30/84 at 44. This reasoning might lead the court to find that the appropriate state law is the law of the District of Columbia. J-M also strenuously argues that this court should apply the general tort law of California in evaluating its claims. *See e.g.*, Plaintiff's Supplemental Memorandum, filed 10/1/84 at 48-52 (court should apply California's Good Samaritan law). Moreover, J-M argues that the court should apply California's conflict of law rules in reaching a decision to apply federal maritime law. Plaintiff's Opposition at 44; Plaintiff's Supplemental Memorandum at 24.

Under the FTCA, the court must decide "where the negligent act or omission occurred and not where the negligence had its 'operative effect' (i.e. the situs of the injury.)" *Roberts v. United States*, 498 F.2d 520, 522 n.2 (9th Cir. 1974). Bad acts or omission on the part of the government may have occurred all over the United States, but J-M is complaining here about the alleged actions occurring at two naval bases in California where the government's alleged failure to warn and supervise John Robinson was the proximate cause of the harm J-M suffered in this case. The court, therefore, looks to and applies California law.

Claims One through Three:

J-M argues that, in its first three claims, it alleges breaches of duties that the United States owed directly to J-M; that J-M is not suing derivatively for breaches of duties running solely to Robinson. Therefore, J-M argues, any workmen's compensation law, either the Longshoremen and Harbor Workers' Compensation Act or California workmen's compensation law, is inapplicable to this case. The only applicable law is general tort law of California.

In Claim One, J-M alleges that the government had a duty to "investigate, evaluate, report, and disclose the potential risks associated with installation or removal of asbestos-containing materials in the Navy shipyards," J-M's First Amended Complaint, ¶ 53, and that the failure of the government to carry out this duty caused the injuries allegedly sustained by Robinson. J-M thus maintains that it is "entitled to receive from the United States any damages sustained by Johns-Manville in connection with the *Robinson* case." *Id.* at ¶ 54.

In Claim Two, J-M claims that the government had exclusive control over the asbestos product specifications and knowledge, superior to J-M's, of the risks involved for workers using asbestos. This exclusive control and superior knowledge gave rise to an implied tort duty to indemnify J-M for any damages that resulted from J-M's compliance with these government specifications. J-M alleges that the money it paid out to Robinson in settlement is included within those damages that the government had a duty to indemnify.

Finally, in Claim Three, J-M alleges that the government impliedly warranted that it would use the asbestos-containing materials in its shipyards in a "safe manner designed to prevent exposure to excessive concentrations of asbestos, and in a manner designed to conform with recognized and Government adopted standards and safe work practices." *Id.* ¶ 61.

The government also allegedly warranted that it would indemnify J-M for any claims it paid to workers such as Robinson, who were allegedly injured as a result of the government's negligent utilization of the asbestos materials. J-M alleges that the government committed tortious ("negligent") breaches of these warranties, and that J-M is entitled to full indemnity of the amount it paid to Robinson. *Id.* at ¶ 63.

In support of these claims, J-M points to a number of facts which, under this motion, the court must take as true. *Church of Scientology of California v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). First, J-M alleges that, during World War II and in the years thereafter, it was required by law to enter into contracts for the supply of asbestos-containing materials for use in the construction, conversion, or repair of Navy vessels. First Amended Complaint at ¶¶ 12, 13. Second, J-M alleges that the government participated in the design and specification of these materials. *Id.* at ¶ 13. Third, J-M alleges that the government established its own standards based on superior knowledge of the health hazards of asbestos, for the safe use of asbestos. *Id.* at ¶¶ 14-21. But, the government allegedly failed to enforce its own safety standards. *Id.* at ¶ 22. And fourth. J-M alleges that tte government had exclusive control over working conditions in the navy shipyards and at times (particularly during 1964-66) blocked J-M's efforts to present its asbestos-related safety programs to employees of government shipyards. *Id.* at ¶¶ 22-50.

The court analyzes J-M's claims under California tort law,[6] and finds that J-M's allegations do support a cause

[6] This is the analysis the district court in Maine used when confronted with the claims by a group of asbestos manufacturers, defendants in suits by various persons who worked with asbestos, against the United States for a series of alleged breaches of duties the government owed the manufacturers. The district court in Maine evaluated the manufacturers' claims against the government under Maine tort law, and dismissed most of the manufacturers'

of action that sounds in tort. J-M must prove that the government forced J-M, under the threat of civil and criminal sanctions, to supply asbestos that conformed to government specifications, and that the government had knowledge, superior to that of J-M's that asbestos was harmful to the safety of its workers. Furthermore, J-M must show that the government failed to implement safety procedures to protect its workers.

While no California tort principles neatly fit the facts alleged in this case, the court looks to California law to impose upon the government a duty to act with reasonable care towards J-M. The court relies on analogies from the California law of special relationships to find legal support for J-M's claims in counts one through three. The court concludes that the defendant created a special relationship with J-M when it allegedly required J-M, under penalty of law, to supply products the defendant knew to be dangerous to its workers.

"[T]he common law, reluctant to impose liability for nonfeasance, generally does not impose a duty upon a defendant to control the conduct of another . . . [citations omitted], unless the defendant stands in some *spe-*

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claims for failure to state claims. *In Re All Maine Asbestos Litigation*, 581 F. Supp. 963 (D.Me. 1984).

In the *All Maine Asbestos Litigation*, case, the court said that the asbestos manufacturers had stated a cause of action against the government on a Good Samaritan theory. The manufacturers sought indemnity for claims by government shipyard workers on the theory that, "by undertaking to conduct studies, surveys and experiments designed to protect the health and safety of asbestos workers, who relied on the United States' actions to their detriment, the United States assumed a duty to provide warnings and otherwise exercise reasonable care to proect those workers." *All Maine Asbestos Litigation, supra*, 581 F. Supp. at 977-78.

The court went on to hold that summary judgment against the manufacturers on this count was warranted, because there was no evidence that the workers were aware or ever relied on any health and safety surveys or studies the government was doing. *Id.* at 978-79.

cial relationship either to the person whose conduct needs to be controlled or to the foreseeable victim of such conduct." *Johnson v. County of Los Angeles*, 143 Cal. App. 3d 298, 191 Cal. Rptr. 704 (1983). In *Johnson*, the County Sheriff arrested the decedent for driving on the wrong side of the freeway in an attempt to commit suicide. Shortly after the arrest, plaintiff, the decedent's wife, informed the defendants that the decedent was a paranoid schizophrenic who had suicidal tendancies and required immediate care. She also told defendants that the decedent should not be released. The defendants assured plaintiff that they would hospitalize decedent and that she should not worry. *Id.* at 304, 191 Cal. Rptr. at 707. The defendants, however, released the decedent without informing the plaintiff, and two days later he committed suicide. the court in *Johnson* concluded that "Sheriffs here stood in a special relationship to Decedent and to Appellants, and had a duty to warn Appellants before releasing Decedent." *Id.*

In order to establish this special relationship, J-M must establish, at a minimum, the foreseeability of the harm. *Johnson v. County of Los Angeles, supra*, 143 Cal. App. 3d at 308, 191 Cal. Rptr. at 710 (1983). Here, J-M has alleged facts that would show foreseeability, if the government knew of the harms associated with asbestos, knew that it could take safety precautions to avoid the harm, and knew that Robinson could sue J-M for harm done to him by the asbestos.

That J-M was a reasonably foreseeable victim is not alone sufficient to establish the special relationship. *Davidson v. City of Westminster*, 32 Cal.3d 197, 209, 649 P.2d 894, 898, 185 Cal. Rptr. 252, 258 (1982). In *Davidson*, the California Supreme Court held that the police had no duty to warn a husband and wife in a laundromat of the presence of a person the police suspected of previous stabbings, even though the police had this suspect under surveillance in the laundromat with the couple. *Id.* at 210, 649 P.2d at 900, 185 Cal. Rptr. at 258. The

suspect eventually stabbed the wife, but the court said it would not implace a duty to warn on the police, even though the wife was a reasonably foreseeable victim, because the police had not placed the wife in danger and the couple did not rely on the protection of the police when they went into the laundromat.

The Court explained, "a finding of special relationship does not require a promise or reliance thereon in order to impose a duty of care." *Id.* at 207, 649 P.2d at 899, 185 Cal. Rptr. at 257. But, in order to impose a duty to protect, the defendant must either place the plaintiff in danger or act in such a way so that the plaintiff becomes dependant upon the defendant. *Id.* at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258.

Here, J-M has alleged that, by forcing it to supply asbestos, the government had a duty to J-M to see that it would not suffer injury from a danger that the government created. J-M was clearly dependant upon the government because it was compelled to supply asbestos to the government for ships upon which Robinson was eventually to work.

The court recognizes that the special relationship doctrine does not fit the typical manufacturer-supplier relationship because the parties in the typical situation consent to deal with each other and presumably can negotiate contractual provisions to protect themselves.[7] Hence, the parties do not need the protection of tort law, that im-

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[7] *Cf., Santisteven v. Dow Chemical Company,* 506 F.2d 1216, 1219 (9th Cir. 1974). In this case, a copper company employee, who was seriously injured while using flake caustic soda, brought a personal injury action against the supplier of the chemical. The supplier then filed suit against the copper company claiming that the copper company had a duty to the supplier to avoid subjecting the supplier to tort liability. In rejecting this theory, the Ninth Circuit held simply that "indemnity does not work in this way." *Id.* The court stated that "in the absence of a specific legal relationship (e.g. master-servant) or contract-type obligation, indemnity is tirggered not by "an abstract duty owed a third party" but only when it is more just to shift the burden of loss. *Id.*

poses duties of reasonableness upon people whether they agree explicitly to such restraints or not. Rather, to the extent that the government required J-M to supply asbestos, J-M was not like an ordinary supplier who sold his products voluntarily to the buyer and who could freely negotiate contract terms. The facts alleged in the case at bar are analogous to the case in which one side in a contractual relationship has oppressive bargaining power, and uses this power unfairly in the bargaining process or to obtain unconscionable terms in the contract. In such situations, the California legislature directs the courts to refuse to enforce unconscionable contract terms. Cal. Civil Code § 1670.5 (codifying the Uniform Commercial Code's unconscionability section 2-302, and applying it to all contracts, not just sale of goods contracts). The doctrine represents the public policy against oppressive contractual relationships.

J-M's Third Claim is also based on tort duties that arise from an implied-in-fact contractual relationship. J-M alleges that the facts of the government's participation in the design and specification of the asbestos-containing products, its representations as to the safe use of the products, its failure to allow J-M to present certain safety programs at the naval bases, and the assurances that the government was handling safety matters adequately, all support a claim of implied contractual indemnity. In other words, J-M could have interpreted this government activity as a signal that the government was assuming responsibility for worker safety, that J-M was relieved from further duty relating to safety, and that the government would indemnify J-M for any damage caused by the government's failures in providing for its workers' safety.

Under California law, an obligation to indemnify may arise from either of two general sources: "First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon

the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 506-07, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978); *Rossmoor Sanitation Inc. v. Pylon Inc.*, 13 Cal.3d 622, 628, 532 P.2d 97, 100, 119 Cal. Rptr. 449, 452 (1975).

Defendant argues in its Reply Memorandum that, to the extent J-M's Claims One, Two, and Three are based on a contractual theory, J-M has not alleged proper jurisdiction in its First Amended Complaint. Government's Reply, at pp. 23, 25, 26. Specifically, defendant argues that an action based on a contract must be brought under the Tucker Act, 28 U.S.C. § 1346(a)(2) and § 1491. Defendant maintains that as J-M does not allege Tucker Act jurisdiction, J-M's claims must be dismissed. This argument, however, misunderstands J-M's theory. J-M alleges that a tort duty resulted from the relationship of the parties. California courts have long recognized that a "wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort." *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 174-75, 610 P.2d 1330, 1334, 164 Cal. Rptr. 839, 843 (1980). It is well-established law in California "that if the cause of action arises from a breach of promise set forth in the contract, the action is ex contractu, but if it arises form a breach of duty growing out of the contract, it is ex delicto." *Id.*, quoting *Eads v. Marks*, 39 Cal.2d 807, 811, 249 P.2d 257, 260 (1952).

The purpose of imposing tort duties upon contracting parties is to implement fundamental public policy. *Tameny v. Atlantic Richfield Co., supra* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 174-75. In *Tameny*, the Cali-

fornia Supreme Court recognized the policy of protecting employees who refuse to obey employer's instructions to violate the law. The court held that an employer who threatens to or discharges an employee for refusing to violate anti-trust laws, wrongfully encourages an employee to violate his duty to obey the law. Thus, an employee who is fired for refusing to violate anti-trust laws may maintain a tort action for wrongful discharge and is not limited to suing for breach of contract. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846.

While California courts have never recognized such a duty in a buyer-seller relationship, J-M did not have a typical buyer-seller relationship with the government. The fundamental public policy in this case is represented in the policy against unconscionability in contractual relationships. As stated above, the California legislature has extended the U.C.C.'s unconscionability doctrine to all contracts. And prior to the enactment of Cal. Civil Code § 1670.5 in 1979, "[u]nconscionability ha[d] long been recognized as a common law doctrine which [was] consistently applied by California courts in the absence of specific statutory authorization. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 484, 186 Cal. Rptr. 114, 121 (1982). Thus, the facts J-M alleges support a cause of action under this tortious breach of an implied contractual provision also.

The duty on the part of the government that the court finds here is limited to injury J-M suffered by way of lawsuits caused by asbestos J-M was forced by law to supply to the government, not from asbestos J-M voluntarily contracted to supply. It appears, however, that Robinson was not working during the time J-M had a mandatory obligation to provide asbestos. But, counsel for J-M suggested at oral argument that Robinson worked to refit ships and remove asbestos that had been installed the time J-M was under legal obligation to supply asbestos. The court will treat defendant's motion to dis-

miss as a motion for more definite statement as to the causal element in counts one through three. *See Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120, 123-24 (N.D. Cal. 1970). The court grants J-M thirty days to amend its pleading to alleged explicitly this fact of causation.

To the extent that J-M alleges harm caused by asbestos it supplied as part of a contractual relationship entered into freely, the court finds J-M does not state a cause of action that sounds in tort. The concerns the court has about the element of coersion are not present when J-M chooses to enter into contracts to sell asbestos to the government, especially after 1964, when by J-M's own pleading, it realized the dangers of asbestos. J-M's first amended complaint ¶ 49. Rather, J-M is left with its claim for equitable indemnity, as set forth below.

Claim Four: Equitable indemnity:

J-M's fourth claim seeks equitable indemnity from the government for its alleged negligence towards Robinson on two grounds. First, J-M argues that the government breached a duty of care to Robinson, as Robinson's employer, and therefore J-M is entitled to partial equitable indemnification for the portion of the government's fault. J-M also contends that the government breached a duty of care it owed to Robinson in its role as the owner of the vessels upon which Robinson worked.

The court begins its discussion of third-party suits against the United States with the 1983 Supreme Court decision of *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). In *Lockheed*, the Supreme Court rejected the argument that the exclusivity provision of the Federal Employee Compensation Act (FECA) barred third party indemnity suits against the United States. The FECA prohibits "actions against the United States by an employee, his legal representatives, spouse, dependents, next of kin, [or] any other person otherwise entitled

to recover damages from the United States . . . because of the [employee's] injury or death." 5 U.S.C. § B116(c).

In *Lockheed*, the Lockheed Aircraft Corporation sought indemnity from the United States for a settlement Lockheed had reached with a federal employee who was injured in a Lockheed airplane. The Court reviewed the language of the FECA exclusivity provision, the legislative history, and public policy underlying the FECA. The Court found that the *quid pro quo* present in the FECA, and all worker compensation legislation—in which employees are guaranteed immediate fixed benefits in return for the right to sue the government—did not operate to bar third parties from suing the government. Under the FECA, these third parties received no *quid pro quo* in exchange for giving up the right to sue the government. *Id.* at 198.

It is important, however, to remember that *Lockheed* does not confer upon a third party a right to sue, rather the Supreme Court just said that the FECA does not present a bar to third-party suits. *Id.* As the Court explained, the issue of the substantive law of indemnity was not before the Court. *Id.* at 197, n.8. Thus, the plaintiff must affirmatively establish that it has a valid theory for indemnification.

To establish affirmatively its claim, the FTCA requires J-M to show that a private person in similar circumstances would be liable to J-M. The California Supreme Court, in *American Motorcycle Association v. Superior Court of Los Angeles*, 20 Cal.3d 578, 591, 578 P.2d 899, 907, 146 Cal. Rptr. 162, 190 (1978), held that California's equitable indemnity law is to be based on a comparative negligence concept. The co-defendent tortfeasors remain jointly and severally liable to the plaintiff, but may apportion damages among themselves on a percentage fault basis. Of course, J-M may obtain equitable indemnity from the government only if J-M can show that the government could have been liable to Robinson.

It is clear that the government, as a private employer in the state of California or under the Longshoremen and Harbor Workers' Compensation Act, ordinarily would not be liable to Robinson in a tort action. He is limited to recovering workmen's compensation. 33 U.S.C. § 905 (a); Cal. Labor Code § 3684. J-M has two theories, however, on which to argue that the government, as a private employer in California, could be held liable to Robinson. The court examines each of J-M's arguments in turn.

1. Government as a vessel owner:

Both parties agree that, if the government were a private employer in this case, the Longshoremen and Harbor Workers' Compensation Act (LHWCA) would apply.[8] The Supreme Court has said that, if the employer also owns the vessel on which the employee is injured, the LHWCA allows the employee to sue the employer in negligence, not in his capacity as employer, but as the vessel owner. *Jones & Lauglin v. Pfiefer*, 462 U.S. 523, 532 (1983). The Court allowed this action because § 905(b) of the LHWCA preserves the employee's right to sue a vessel owner for negligence. The Court reasoned that the employer, as vessel owner, should not escape the effect of this statutory provision merely because it also happens to be the employer. *Id.*

Treating the government as a private employer under the LHWCA, Robinson could have sued the government-employer under a negligence theory. In turn, this underlying liability allows J-M to sue the government for equit-

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[8] Both parties agree that the LHWCA would apply if the court treated the government as a private shipyard employer in California. Government's Memorandum in Support, filed 5/14/184 at 8. Plaintiff's Memorandum in Support, filed 7/30/84 at 30. The LHWCA covers "any harborworker including a ship repairman, shipbuilder, . . ." 33 U.S.C. § 902(3). Robinson worked as an insulator in ships in dry dock.

able indemnity, unless some other bar to J-M's recovery exists. The government asserts two potential bars to J-M's recovery. First, the government argues that § 905 (a) of the LHWCA is an exclusivity provision that absolutely bars J-M's third-party suit. Section 905(a) provides that "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

The LHWCA's exclusivity provision is virtually identical to the exclusivity provision of the FECA that was the subject of the *Lockheed* decision. As the government did in *Lockheed* with regard to the FECA, the government argues here that this exclusive remedy provision bars J-M's third party suit. The government attempts to distinguish *Lockheed* by saying that in this case, the legislative history of the 1972 LHWCA amendments, of which § 905(a) was one, shows that Congress intended to bar third-party indemnity suits.

The court reads the legislative history differently. The legislative history reveals that Congress intended to bar *vessel owners* from being indemnified from stevedore-employers for money damages that the vessel owners paid out to the longshoremen-employees injured by the vessel owner's negligence. In return, however, Congress shielded the *vessel owners* from suits by longshoremen on a seaworthiness strict liability doctrine. That is, longshoremen can only sue the vessel owners on a negligence theory, though prior to 1972, the Supreme Court had said they could sue vessel owners on a seaworthiness theory. *Sees Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

It is clear from the legislative history of the 1972 amendments that Congress was concerned with balancing

the duties and liabilities among these three specific parties. The legislative history does not show that Congress had other third parties in mind when it was considering barring suits for indemnity against the stevedore-employer.

Apparently, the only court to have considered whether the LHWCA bars indemnity suits by third parties other than vessel owners, decided that the *Lockheed* decision provides that the indemnity action is not barred. *Austin v. Johns-Manville Sales Corp.*, Civil. No. 78-122 P, bench ruling (March 9, 1984). The court in *Austin* had originally ruled that the LHWCA did bar manufacturers' indemnity suits against employers, 508 F. Supp. 313 (D. Me. 1981), but reversed itself in light of *Lockheed.*

In *Lockheed*, the Supreme Court commented on the LHWCA, by way of contrast with the FECA, and noted that Congress abolished the third-party indemnity action only in conjunction with a *quid pro quo* to benefit the third party. The only third party that benefits under the LHWCA, however, is the vessel owner. A manufacturer, such as J-M, may still be liable to an employee on a strict liability theory. In fact, Robinson's complaint, attached as Exhibit B to Plaintiff's Memorandum in Opposition, filed 7/30/84, pleads a claim that sounds in strict products liability. (Robinson's third cause of action). In *Lockheed*, the fact that Congress had provided no *quid pro quo* in the FECA compensation scheme for the third party was grounds for the Court to refuse to bar the third party's claim against the United States. The same result is warranted here.[9]

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[9] The government points to a recent amendment to § 905(b) of the LHWCA that prohibits the employee from suing the vessel owner who is an employer on a negligence theory. The fact that Congress passed this amendment, to overrule *Jones & Laughlin*, serves to show that Congress recognized that the court's interpretation of the LHWCA, in effect during the time relevant to this case, is correct.

The government also argues that the exclusivity provision of the California workmen's compensation act bars J-M's recovery in this case. Under California law, if an employee is injured in the scope of his employment, Labor Code § 3864 "normally precludes a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause of the injury." *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 607 n.9, 578 P.2d 899, 917-18 n.9, 146 Cal. Rptr. 182, 200, n.9 (1978); *E.B. Willis Co., Inc. v. Superior Court of Merced County*, 56 Cal. App. 3d 650, 654, 128 Cal. Rptr. 541, 542 (1976) (under Labor Code § 3864, employer only required to indemnify a third party if there is an express indemnification agreement).

The answer to the government's argument on California workmen's compensation law turns on an analysis of J-M's claim that California workmen's compensation law would allow Robinson to sue an employer covered under such law. The court considers J-M's argument below.

2. Government as a co-manufacturer:

J-M alleges that the government could be held liable to Robinson based on California's "dual capacity doctrine." [10] *See* Plaintiff's Supplemental Memorandum, filed 10/1/84 at 35-39. This doctrine allows the employee to sue an employer whose acts, done in a legal capacity other than an employer, cause injury to the employee. *Shields v. County of San Diego*, 155 Cal. App. 3d 103, 109, 202 Cal. Rptr. 30, 34 (1984). As applied to an employer-manufacturer, it affords an injured employee, statutorily entitled to a workmen's compensation award, a separate remedy against the employer when the injury results

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[10] The California legislature eliminated the employee's right to pursue actions under the dual capacity doctrine, by amending the Labor Code § 3602. This section did not go into effect until January 1, 1983, and does not affect cases that arose before that date. *Franco v. United Wholesale Lumber Co.*, 148 Cal. App. 3d 981, 983 n.1, 196 Cal. Rptr. 430, 431 n.1. (1984).

from an act or omission of an employer and is inflicted in a relationship distinct from that of employer-employee. Thus, an employer whose employee is injured when using a defective device manufactured by an employer, is liable for breaching a duty toward the employee that differs from the duty created by the employer-employee status. *Id.*; *Bell v. Industrial Vagas, Inc.*, 30 Cal.3d 268, 282, 673 P.2d 266, 273, 179 Cal. Rptr. 30, 39 (1981); *Franco v. United Wholesale Lumber Co.*, 148 Cal. App. 3d 981, 983, 196 Cal. Rptr. 430, 431 (1984).

In applying the dual capacity doctrine to an employer-manufacturer, the courts focus on "whether the manufacturer sells the defective product to the general public." *Nicewarner v. Kaiser Steel Corp.*, 143 Cal. App. 3d 31, 37, 191 Cal. Rptr. 522, 525-26 (1983). In *Nicewarner*, a plaintiff-employee, acting within the course and scope of his employment, was injured when an improperly connected steel beam fell fifteen feet to the ground. The steel beam was specifically fabricated by the products division of the employer, Kaiser Steel Corporation, and the plaintiff alleged the beam was "not unique in that it was generally of a size and design regularly fabricated by [Kaiser] and stockpiled for sale to the public." *Id.* at 34, 191 Cal. Rptr. at 524.

The court explained that the dual capacity exception only applies if the plaintiff can show that: 1) the defendant does manufacture the product for sale to the public, and 2) the risk thereby created is the same as the one which the plaintiff was exposed. *Id.* at 40, 191 Cal. Rptr. at 522. The plaintiff in *Nicewarner* failed because he could not show that the risk of injury that befell him, from the improper connection, was one that the public faces when using the steel beam.

J-M's allegations that the United States was liable to Robinson under the dual capacity doctrine cannot pass the *Nicewarner* analysis. While the United States al-

legedly aided in the design and arguable the manufacture of the asbestos-containing products, J-M does not allege that the United States ever sold these products to the general public at either the wholesale or retail level. It is only through the manufacture and sale of the asbestos-containing products that the United States could be exposed to liability under the dual capacity doctrine. The court, then, must grant the United States' motion to dismiss claim four to the extent that it is based on the government's liability to Robinson in its capacity as manufacturer.[11]

CONCLUSION

For the foregoing reasons, the court hereby:

1. DENIES the defendant's motion to dismiss claims one, two, and three, to the extent that J-M alleges that it was forced, under threat of civil and criminal penalties, to supply asbestos to the government,

2. GRANTS the plaintiff 30 days to amend its complaint to allege explicitly facts to show how the asbestos J-M was forced to supply to the government caused harm to Robinson,

3. GRANTS the defendant's motion to dismiss claim one, two, and three, to the extent that these claims rest

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[11] In the case of *In Re All Maine Asbestos Litigation*, 598 F. Supp. 1571 (D.Me. 1984), the court did not dismiss a claim by the asbestos manufacturers that is very similar to J-M's claim here. In Maine, the defendant asbestos manufacturer sought indemnity from the government for its negligence towards employees in its capacity as vessel owner. *Id.* at 1575. The district Court in Maine did not dismiss the claim because it was not clear whether the Maine courts would accept a dual capacity theory. *Id.* at 1576. The court said it would consider a motion for certification to the Maine Supreme Court.

Unlike Maine law, however, the California courts have defined and discussed the dual capacity doctrine, and it is clear that, if presented with the allegations in this case, the California courts would not allow Robinson to sue his employer as a co-manufacturer.

on sales of asbestos J-M made to the government voluntarily, and

4. DENIES the defendant's motion to dismiss claim four to the extent it claims indemnity for the government's liability to Robinson in its capacity as vessel owner.

IT IS SO ORDERED.

DATED: August 20, 1985

/s/ Robert F. Peckham
Chief United States District Court Judge